

83 - 2065 ①

No. \_\_\_\_\_

Office-Supreme Court, U.S.  
Office-Supreme Court, U.S.  
**FILED**  
**JUN 15 1984**  
ALEXANDER L. STEVAS,

IN THE

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1983

\_\_\_\_\_

ROLAND A. JONES,

PETITIONER,

v.

DEPARTMENT OF HUMAN RESOURCES (DHR),  
STATE OF GEORGIA, et al.,

RESPONDENTS.

\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

\_\_\_\_\_

ROLAND A. JONES  
PRO SE  
1390 HEATHERLAND DR.  
ATLANTA, GA 30331  
(404) 344-1332

SGP





## QUESTIONS PRESENTED FOR REVIEW

- I. WHETHER A MEMBER OF THE PROTECTED GROUP IS STILL PROTECTED UPON BECOMING A PROBATIONARY EMPLOYEE?
- II. WHETHER A CLASSIFICATION OF "PROBATION", WITHOUT SAFEGUARDS TO PREVENT DISCRIMINATION, IS IN VIOLATION TO SEC. 703 (a), TITLE VII, AND CAN IT BE USED AS A MECHANISM TO DISMISS MINORITIES PRIOR TO THE END OF PROBATION?
- III. WHETHER BISHOP AND ROTH WHEN INVOKED BY RESPONDENTS AS A DEFENSE AGAINST DISCRIMINATION FORECLOSED ON RIGHTS PROVIDED OR BY GRIGGS AND MCDONNELL
- IV. WHETHER BISHOP v. WOOD SHOULD BE OVERRULED, OR REDEFINED, IN ITS APPLICATION TO MEMBERS OF THE PROTECTED GROUP WHEN THEY ARE PROBATIONARY/WORKING TEST?
- V. WHETHER THE INVOLUNTARY SEPARATION RULE 12.301.1 IS VAGUE IN ITS MEANING, AND BY PETITIONER'S SPEEDY TERMINATION, IS ITS APPLICATION ARBITRARY AND FORECLOSED ON 1ST AMENDMENT AND SECTION 704 (A) RIGHTS TO SPEAK AGAINST DISCRIMINATORY TREATMENT AGAINST HIS PERSON?
- VI. WHETHER NOT BEING ALLOWED ACCESS TO IN-HOUSE GRIEVANCE PROCEDURES IS IN VIOLATION TO SEC. 704 (a), TITLE VII?
- VII. WHETHER ROTH, AND PICKERING SHOULD BE OVERRULED, OR REDEFINED, IN THEIR APPLICATION TO PROTECTED GROUP 704 (a) RIGHTS?
- VIII. WHETHER PETITIONER PLACED BEFORE THE COURTS SUFFICIENT PRIMA FACIE INFORMATION/EVIDENCE FOR DISCRIMINATION AND RETALIATION?
- IX. WHETHER DISCRIMINATION WAS THE RESULT?

## CERTIFICATE OF INTERESTED PERSONS

I HEREBY CERTIFY that the following persons are interested in the outcome of this case:

The Honorables Godbold, Chief Judge, Roney, and Tjoflat, Circuit Judges, 11th Circuit.

The Honorable Marvin H. Shoob, District Court for the Northern District of Georgia.

Roland A. Jones, Lt. Col., U.S. Army (ret.) (Petitioner).

### Respondents:

Dr. L. Patricia Johnson, Division of Family and Children Services (DFACS), DHR, 47 Trinity Avenue, S.W., Atlanta, Georgia 30334.

Mr. Douglas G. Greenwell, DFACS, DHR, 47 Trinity Avenue S.W., Atlanta, Georgia 30334.

Mr. Truman A. Moore, DFACS, DHR, 47 Trinity Avenue S.W., Atlanta, Georgia 30334.

Mrs. Barbara G. Deedy, DFACS, DHR, 47 Trinity Avenue S.W., Atlanta, Georgia 30334.

Ms. Diana K. Fox, DFAC, DHR, 47 Trinity Avenue S.W., Atlanta, Georgia 30334.

Mr. Wayne P. Yancey, Attorney for Respondents.

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#### CONSTITUTIONAL AND FEDERAL PROVS. INVOLVED

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"no person...shall be deprived of life,  
liberty, or property, without due pro-  
cess of law..."

FOURTEENTH AMENDMENT...	14, 17, 25, 36, 55, 63
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"no State shall make or enforce any law  
which shall abridge the privileges or  
immunities of citizens of the United  
States; nor shall any State ...deny to



any person within its jurisdiction the equal protection of the laws" [emphasis supplied].

## FEDERAL LAWS

28 U.S.C. ....14, 18

42 U.S.C. 1981, .....3, 33

42 U. S. C. 1981 - This provides in part that "all persons... shall have the same right in every State...to the full and equal benefit of all laws..."

42 U.S.C. 1983,.....3, 43, 47

42 U. S. C. 1983 - This provides that "every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects...any citizen...to the deprivation of any rights...shall be liable to the party injured..."

42 U.S.C. 1985,.....3

42 U.S.C. 2000e, subsections (a) and (b), provide as follows:

For the purposes of this subchapter-  
"(a) The term 'person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.....32, 37, 38

SECTION 701.....18, 61

SECTION 703(a) provides in part:

"It shall be an unlawful employment practice ... (1)...to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment... (2) to limit, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee..."

SECTION 703(h) "Notwithstanding any other provisions of this subchapter, it shall be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide ... merit system..."

SECTION 704 (a) states that it shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment...because he opposed any practice made an unlawful employment practice...or because he has made a charge...in any manner

GEORGIA LAW

SECTION 6a, GEORGIA EMPLOYMENT  
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DHR RULE A.6. a..5, 36, 51, 54, 55, 59, 60, 61

SEE APPENDIX F FOR OTHER RULES

IN THE  
SUPREME COURT OF THE UNITED STATES  
TERM: OCTOBER 1983

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No.

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ROLAND A. JONES,

PETITIONER,

v.

DEPARTMENT OF HUMAN RESOURCES (DHR),  
STATE OF GEORGIA, et al.,

RESPONDENTS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE ELEVENTH CIR.

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The Petitioner, Roland A. Jones, respectfully petitions this Court for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit for a discrimination complaint.

OPINION BELOW

On March 23, Petitioner's Petition for Rehearing with a suggestion for Rehearing En Banc was denied and judgment against Petitioner's Discrimination and Retaliatory Discharge Complaint was affirmed, with prejudice,

pursuant to, and justified by Bishop v. Woods, 426 U. S. 341, 349-50, 96 S.Ct. 2074, 2079-80, Board of Regents v. Roth, 408 U. S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), Pickering v. Board of Education, 391 U. S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968), and F. R. Civ. P. Rule 12 (b). The Court of Appeals Memorandum decision at Appendix A affirmed only the 1893 claim. The District Court's Bishop, Roth dismissal judgment against Petitioner's discrimination complaint is at Appendix B. An F. R. Civ. P Rule 60 (b) (6) again asserting review of all the discrimination issues was denied May 24, 1984, Appendix B3.

#### JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code.

#### CONSTITUTIONAL PROVISIONS INVOLVED:

1st Amendment, U. S. Constitution  
5th Amendment, U. S. Constitution  
14th Amendment, U. S. Constitution

#### FEDERAL STATUTES INVOLVED:

42 U. S. C. 1981, 42 U. S. C. 1983, 42 U. S. C. 2000e, Section 703 (a), 703 (h), and 704

(a), 706 (g) (2000e-5).

**STATE STATUTES INVOLVED:**

Georgia Law, Article IV, Section 6, Para. I, State Constitution of 1976, Merit System Act (GA Law, 1975, P 79), Georgia Law, 1975, Section 7, Adverse Actions, Appeals and Hearings, Georgia Law, Section 45-20-2 (16) and (17), and Georgia Employment Security Law, Section 6 (a) with reference to the requirement: "provide employee with...document...giving the reasons for separation."

**FEDERAL RULES INVOLVED:**

Rule 12 (b) (1) and (b) (6), Rule 12 (e), Rule 37, Rule 41 (b), Rule 60 (b) (6).

**MERIT SYSTEM RULES AND REGULATIONS INVOLVED**

(See Appendix E)

**STATEMENT OF THE CASE**

This action was filed November 19, 1982 in the United States District Court for the Northern District of Georgia, pursuant to 42 U.S.C. 1981, 1983, and 1985, and the First and Fourteenth Amendments, alleging that defendants entered into an agreement and an ensuing

and continuing "pattern" of disparate treatment, "discrimination", and "retaliation" designed to deny appellant other job opportunities within the division; because of appellant's opposition to discriminatory practices and procedures used by the supervisors, supervisors in the Division of Family and Children Services (DFACS) terminated petitioner's employment with the DFACS, DHR, using practices and procedures that were made unlawful under, Title VII, U. S. Supreme Court decisions, and decisions against the DHR in this circuit (Kennedy v. Crittenden, CA77-200 (MD GA 1982)).

The complaint covers ten charges (10) of Grievous Causes as Defined in Par. F.103 Regulation F, State Merit System Rules and Regulations, identified in the State of Georgia Merit System's list of Grievous Causes that could be brought within the Grievance Procedure of the State Merit System at Appendix J2:

1. unlawful discrimination because of race,
2. unfair discriminatory treatment,
3. erroneous interpretation of DFACS/DHR policies,
4. erro-



neous application of DFACS/DHR policies, 5. erroneous interpretation of the State Merit System's Rules and Regulations, 6. erroneous application of the State Merit System's Rules and Regulations, 7. capricious interpretation of DFACS/DHR policies, 8. capricious application of DFACS/DHR policies, 9. capricious interpretation of the State Merit System's Rules and Regulations, 10. capricious application of the State Merit System's Rules and Regulations, 11. operating a probationary period that is wholly subjective, and 12. arbitrary discharging Petitioner using the ambiguous Involuntary Separation Rule 12.301.1 coupled with the DHR Rule A.6.a (App. F#32) to foreclose in-house grievance rights.

The complaint contains a demand for a jury trial for a deprivation of civil rights for \$250,000.00 against each Respondent, individually and in their capacities, and punitive damages of \$250,000.00 against each Respondent, individually and in their capacities. The action also seeks injunctive relief, rein-



statement with all rights/benefits retroactive, legal expenses, and any other action deemed appropriate by the court.

The complaint set forth all the discriminatory event-by-event facts and circumstances covering a four month, 23 day period (App. D), and copies of the rules and regulations (App. F) violated by the DFACS, DHR supervisors.

A Petition for Respondents to produce appellant's personnel records and other DHR/DFACS records necessary to maintain Petitioner's Complaint was filed, at the time of filing the complaint. This Petition was denied. Statistics (App. E) were provided the District Court in a Motion for Reconsideration citing Griggs and McDonnell Douglas. This Motion for Reconsideration with additional evidence of discrimination was denied. Other motions/requests denied by the District Court include: 1. Request for the "sealed" District Court documents pertaining to the case of Marvin Albitz v. State of Georgia, CA79-634A (P) be opened for Petitioners inspection and

Petitioner's use as evidence of patterns of discriminatory standard operating procedure (SOP) in state government. 2. Reinstate Petitioner's discrimination complaints in its entirety, including the demand for a "jury trial." 3. Withdraw the judgment against me. 4. Amend complaint to add as defendants also engaged in the ensuing and continuing pattern of conduct designed to terminate and perpetuate the termination in the same amounts and conditions as outlined for defendants already at pages 50, 51, and 52 of basic complaint. To be added as defendants: a. Merit System Commissioner Charles E. Storm. b. ex-DHR Commissioner Dr. Joseph Edwards (Involuntarily separated, retired). c. ex-DHR Personnel Director Miss Martha Meyer (Involuntarily separated, retired). d. DFACS Office Director, Ms. Joyce Saye for hiring outside DFACS Training Coordinator. e. Personnel Supervisor Ms. Alice N. Echols. f. The Deputy Director of the State Merit System, Mr. Franklin Thomas, dereliction of duty. g. The Director

of the Georgia Office of Fair Employment Practices, Ms. Jewell Saunders (now terminated)...dereliction of duty. h. Merit System Staff Management employee, Mr. James Huges, dereliction of duty. 5. Leave open the privilege to add others, as they are determined, including those in positions of "trust" and "administrative" responsibility shown to have been negligent in the performance of their duty, thereby, perpetuating my termination by not assuring the proper application of the rules and regulations or by not questioning the oddity of the events and circumstances connected with my termination; however, in all fairness I will readily agree to a dismissal from my complaint any individual, named or added, who reasonably shows the Court that they were not negligent in the performance of their positions of trust and responsibility. 6. Leave open the option of amending my complaint to include other "probationary" employees similarly situated. 7. Leave open the option for other organizations to enter on

my behalf or as friends of the court. 8. Defendants be ordered to provide data for exhibit J for the years 1980, 1981, and 1982 for the total state work force, DHR, and DFACS for the Court. 9. Request an injunction be issued prohibiting the expenditure of federal funds by the Department of Human Resources pending resolution of this matter; and an injunction be issued prohibiting all promotions and hiring within the Department of Human Resources pending resolution of the issues at bar. 10. Request an affirmative action "quota" system for hiring minorities in entry level (probationary level) and the top administrative jobs of the state. 11. Request that all federal funding be withheld from the Department of Human Resources, the Division of Family and Children Services, and the state until reasonable levels of minorities are attained at all levels of government.

The statistics (App. E) claiming that Griggs and McDonnell Douglas applied were submitted and also included in Opening Brief

placed before the U. S. Court of Appeals for the 11th Circuit and denied. Other motions and requests submitted and denied by the U. S. Court of Appeals: 1. Motion to gain access to the sealed District Court records and transcripts for the Albitz discrimination case against the State of Georgia. 2. In view of the Bishop syndrome and its application to discrimination and because of the possibility of a misunderstanding of the nature of the complaint, a motion to refile the case as a new case was filed. 3. Motion for immediate remand for consideration of the discrimination issues. 4. Motion to relocate the case to the Middle District of Georgia. 5. Motion for relief pursuant to F.R.Civ. P Rule 60 (b) (6). 6. Letter citing as newly discovered historical evidence of the trend of the DHR not providing employees a reason for their discharge was returned without action.

#### SUMMARY OF ARGUMENT

I. At the time of the filing, as is now, I was underrepresented only because no counsel

would accept the case because of the Bishop probationary employee syndrome. This is tantamount to raising a federal constitutional question, and is an extraordinary circumstance for triggering the application of Federal Rule 60(b)(6) and giving justice another opportunity to be heard. When Rule 60(b)(6) is applied, it should work the way an aggrieved citizen expects their legal system to work by permitting final judgment to be vacated, modified, and reexamined; however, in the face of all the 11th Circuit Court of Appeals Precedents concerning discrimination submitted still claiming Griggs and McDonnell Douglas applied with a request for the application of Rule 60(b)(6), the Court denied the application which tends to signal that the legal system resents pro se actions and punishes them with a misapplication of justice. The District Court's order plainly provides reason for officials not to comply with "guidelines" (Affirmative Action, included) established against discrimination.



II. Although underrepresented, the facts and circumstances submitted to the District Court (App. D) and the Court of Appeals conveyed the message of discrimination; however, respondents complained to the District Court that the number of pages exceeded the administrative page requirement by five pages...a procedural question rather than substantive. It is obvious that the District Court Judge was more interested in procedure rather than substance because of his ruling at Appendix B2. His concern only for the length of the Motion was clearly an abuse of discretion. Judge Shoob's preoccupation with the "lengthy brief" (App. B2) guided his judgment to administration rather than the substantive discrimination content of the brief. For this matter to be understood, Appendices D, E, F, G, and the J series, herein, must be read and compared. It is obvious that the trend as indicated by both courts with their refusal to confront the issues and the facts is anti-pro se. If not, the judgment would have been in the alterna-

tive as Respondents requested: "...move for more definite statement of plaintiff's claims, pursuant to 12 (e) F.R.Civ.P., or dismissed without prejudice, would not have attempted a catch-all 1983 disposal (App. B), and F.R.Civ.P Rule 60 (b) (6) claim would have been honored when invoked by Petitioner, and the judgment would not have been left to appear to be a punitive discouragement against pro se filings. It is also obvious that both courts are unaware of a Second Circuit holding that:

"pro se complaints are held to less stringent standards than formal proceedings drafted by lawyers" Hohman v. Hogan, 597 F.2d 490 (2d Cir. 1979).

III. Even if I lack the forensic skills and do not plead persuasively, I am confident that the Supreme Court will read and study the facts contained at the Appendices and will not permit a meritorious effort to be lost simply because I am pro se.

IV. Motion to dismiss at pleading stage for lack of jurisdiction should be treated with caution and denied if petitioner alleged suf-



ficient facts in his complaint (Apps. D and E) to support reasonable inference that respondents can be subjected to jurisdiction. Motions to dismiss for failure to state claim should be denied unless it appears beyond doubt that plaintiff can prove no set of facts. Bracewell v. Nicholson Air Services, 680 F.2d 103 (11th Cir. 1982 Ga.). Dismissal of a civil rights suit, alleging racial discrimination in employment practices, is appropriate only when plaintiff has not made a prima facie case. [Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. 2000e et seq.; Federal Rules Civ. Proc. Rule 41(b), 28 U.S.C.A]. Junior v. Texaco, Inc., 688 F.2d 377 (11th Cir. 1982). Dismissal is generally proper only where less drastic sanctions cannot substantially accomplish its purpose. Federal Rules Civ. Proc. Rule 37, 28 U.S.C.A. EEOC v. Troy State University, 693 F.2d 1353 (11th Cir. 1982 Ala.). The 5th (11th) Court of Appeals has noted that:

"...[W]e do not believe that individual

federal judges should have almost unchallengeable power to slow or halt the progress of well-intentioned efforts to eradicate the effects of past discrimination and prevent future discrimination." Accordingly, the Court of Appeals undertook a de nova review. U.S. v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980).

V. A Federal District Court and a Court of Appeals are not duty bound to follow conflicting precedents of Bishop which bear no similarity to discrimination and no uniformity as to discrimination claims brought within the 11th Circuit. They are, however, duty bound to follow the preponderance of precedents established by the U. S. Supreme Court and precedents established within its own 11th (old 5th) circuit.

VI. A Conflicting Federal Court decision dealing with discrimination and the restrictions placed on probationary employees has resulted due to interpretation of Bishop v. Wood. Accordingly, Bishop v. Woods must be overruled or redefined in its' application in cases where Griggs v. Duke Power Co., and McDonnell Douglas v. Green are involved.

VII. No summary of a court case can capture the subtlety of reasoning and argumentation which marks every page of an appellate decision; any summary represents a compression of sometimes lengthy and complex decisions. Contrary to widely held belief, court cases are written in the English language. Judicial opinions are seldom beyond the comprehension of the layman or, needless to say, the professional manager or personnelist.

VIII. In our system of separation of powers the courts are the final arbiters of constitutional interpretation and of statutory construction. Unless an appellate court's determination is overturned by a higher appellate court or modified by subsequent legislation or by a constitutional amendment, it carries precedential authority and is binding within the boundaries of the court's jurisdiction. Bishop, Roth, and Pickering must not be allowed such authority in discrimination against minorities probationary or otherwise.

IX. Petitioner contends that the Petition for

a Writ of Certiorari should be granted for the reasons that the Eleventh Circuit Court of Appeals has rendered a decision in Petitioners case that is in conflict with base-line legal distinctions classifying discrimination as not disposable under Bishop, Roth, and Pickering. As a result of these time-worn precedents, mind-sets have developed causing erroneous classifications of members of the protected group into the Bishop class of employees, resulting in the issuing an illogical decision that is in conflict with the correct civil rights law in light of the historical purpose.

X. A lack of uniform decisions within the circuit creates havoc among decisions on similar questions throughout the Federal Circuits. Thus, Bishop merely created a general guideline of procedures that did not define its impact on discrimination law.

XI. This case boils down to Petitioner having rights to file an in-house grievance for the Merit System and Civil Rights deprivations. However, these rights were foreclosed by Sec.

704 (a) termination, and full rights further foreclosed by the Court.

XII. With the power to destroy the remedy for discrimination goes with it the power to destroy the right. A destruction of rights is clearly a substantive constitutional question which the Court should address and resolve.

#### REASON FOR GRANTING THE WRIT

Where petitioner is a member of a protected group, due process demands that he receive his FULL rights and equal protection under law.

The application of Bishop and Roth by the courts and is in direct conflict with many other appellate holdings on discrimination and denies full rights contained in the tenants of the Constitution, the First, Fifth, and Fourteenth Amendments, the Due Process Clause, equal protection laws, and civil rights laws. The conflict is so deeply entrenched in mind-sets and decisions so as to call for this Court's exercise of the power of supervision and a clear direction of uniformity.

Neither the District or the Appeals Court

reached the merits of the case and did not rule on the issues of discrimination and rights placed before them (App. K). The District Court dismissed per F. R. Civ. P. Rule 12 (b) (1) (6). On the contrary, a Court of Appeals cannot sustain Federal District Court's dismissal unless it is beyond doubt that plaintiff can prove no set of facts which would entitle him to relief. Federal Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.A. Carpenters Local Union No. 1846 of United Broth. of Carpenters and Joiners of America, ALF-CIO v. Pratt-Farnsworth, Inc., 690 F.2d 489 (11th Cir. 1982). It is impossible to be beyond any doubt when the District court did not reach the merits of the case. Dismissal of a civil rights suit, alleging racial discrimination in employment practices, is appropriate only when plaintiff has not made a prima facie case. [Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. 2000e et seq.; Federal Rules Civ. Proc. Rule 41(b), 28 U.S.C.A.]. Junior v. Texaco, Inc., 688 F.2d 377 (11th Cir. 1982).



The circumstances and events (App. D) were provided to both courts, in actions challenging administrative action as discriminatory, even where a stark pattern of discrimination is not evident, both courts did not consider, but should have considered the specific sequence of events leading up to the challenged decision, the departures from normal procedural sequence, the foreseeability of discriminatory impact, and the availability of less discriminatory alternatives [e. g. There are 15 Merit System Rules that provide for less punitive remedies than dismissal (App F, #35 - 49), and more than 15 rules and regulations that should not have been preempted by dismissal that authorized Petitioner the right to file a grievance within the State Merit System (App. F)] discriminatory alternatives. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983). Had I been white, the rules would not have been operated more harshly on me and would have operated with a less punitive alternative than discharge. 1. The District



Court, by reference to "lengthy brief", was either too preoccupied with the complaint from the respondents that Petitioner's complaint was prolix and exceeded the page count by 5 pages, or there was a predisposition (Bishop) that oppressed, preempted, and foreclosed on the issues of discrimination invoking extraordinary circumstance, thereby, triggering F. R. Civ. P Rule 60 (b) (6). 2. The Court of Appeals incorrectly applied Bishop to issues of discrimination, and incorrectly applied Roth to expressions of grievances while in DFACS, DHR in contradiction to decisions of this and other circuits (See cases listed below) and in contradiction to Section 704 (a), Title VII. 3. The District Court, ignored the proper application of principles, prima facia, and burden of proof standards established by the U. S. Supreme Court and decisions of this and other circuits, and refused petitioner discovery. 4. Both the District Court and the Court of Appeals by joining in judgment are perpetuating defen-

dants past/present discrimination reputation.

5. Both courts denied petitioner access records and transcripts pertaining to Albitz v. State of Georgia and the patterns of discrimination within the Merit System of the State of GA in the sealed court records and transcripts. 6. Against Jean, both Courts ignored the historical background for the DHR's reputation for discriminating in Albitz v. State of GA, Kennedy v. (DHR) Crittenden, CA 77-200 (MD GA 1982) when Mr. Albitz testified:

"we are indeed a partner with the agencies to maintain a discriminatory posture, using our own rules and regulations to accomplish this.",

In Whittaker v. DHR, the conclusions of law used by the District Court, ND Georgia that plaintiff, a probationary employee for Georgia DHR had not attempted to identify any of the Merit System's practices and procedures as discriminatory. The Court allowed great latitude to plaintiff:

"so that the plaintiff could challenge either employment practices...or policies affecting working test employees." In the footnote "the Court also extended class discovery so that the plaintiff would have

full opportunity to explore the allegedly discriminatory system-wide employment practices" (used against DHR probationary employees Whittaker v. DHR, CA79-2311A, 30 FR Serv 2d 931, 1980).

These Whittaker probationary latitudes were not allowed in Petitioner's case. 7. In addition

to both courts denying me access to court records for the Albitz case, the District Court denied my motion for defendants to produce documents. 8. Both courts considered

only Bishop and Roth and did not address:

a. Disparate treatment/impact in the denial of length of service and benefits from the first day that I actually reported to work, and improper work assignments. b. Discrimination

in denying petitioner opportunity for the position of Director of Management Information Systems in order for the position to be given to a white male who was from outside of the DFACS, DHR, and the State Merit System. c.

Discrimination in denying petitioner the opportunity for the position of Training Coordinator in order that the position could be given to a white female who was from outside

of the DFACS, DHR. d. Discrimination/disparate treatment for not being allowed to file a formal grievance, in accordance with State Merit System Rules and Regulations. State Merit System Rule 14.212 states:

"A person who feels that there has been a violation of the Rules and Regulations or Merit System Law which adversely affects his rights may appeal..." (See # 20, App. F).

and Rule 14 states:

"An employee who believes he has been unjustly discriminated against in his employment...may appeal to the Board..." (See # 19 at App. F).

e. Disparate treatment/impact for improper discharge, short of completing the working test, in violation of Merit System Rule 11, by means of supervisor retaliatory subjectiveness. f. Retaliation/disparate impact for being abruptly discharged under Rule 12.301.1 without "advance" notice as required by the rules and regulations and for expressing my grievances concerning relief. g. Disparate treatment for not being allowed to invoke the exception clause of Rule 12.301.1 "...the separation cannot be appealed except as other-

wise provided in these regulation" (App. F #8, 12-31, 33, 34), and file a grievance since the discharge was also a grievous action in itself. h. Or, filing a grievance for any action listed as non-grievous which automatically became grievous if discrimination is charged (Submitted as Ex "M", first and last page, RECORD OF EXCERPTS FOR REPLY and Exs "G" and "D", PETITION FOR REHEARING WITH A SUGGESTION FOR REHEARING EN BANC).

(I)

A MEMBER OF THE PROTECTED GROUP IS STILL PROTECTED UPON BECOMING A PROBATIONARY EMPLOYEE.

(II)

A CLASSIFICATION OF "PROBATION", WITHOUT SAFEGUARDS TO PREVENT DISCRIMINATION, IS IN VIOLATION TO SEC. 703 (a), TITLE VII, AND CAN BE USED AS A MECHANISM TO DISMISS MINORITIES PRIOR TO THE END OF PROBATION.

(III)

BISHOP AND ROTH WHEN INVOKED BY RESPONDENTS AS A DEFENSE AGAINST DISCRIMINATION FORECLOSED ON RIGHTS PROVIDED FOR BY GRIGGS AND McDONNELL.

(IV)

BISHOP v. WOOD SHOULD BE OVER-  
RULED, OR REDEFINED, IN ITS'  
APPLICATION TO MEMBERS OF THE  
PROTECTED GROUP WHEN THEY ARE  
PROBATIONARY/WORKING TEST.

(IX)

DISCRIMINATION WAS THE RESULT.

Due process is not a technical conception with a fixed content unrelated to time, place and circumstances; instead, it calls for such procedural protections as the particular situation demands. U.S.C.A. Const. Amend. 14. Central Freight Lines, Inc. v. U.S., 669 F.2d 1063 (11th Cir. 1982). The very nature of due process precludes establishing an inflexible procedure applying without variation to vastly variegated situations. Const. Am. 5, 14. Smith v. Rabalais, 659 F.2d 539 (5th Cir. 1981).

Bishop and Roth are inflexible barriers to claims of discrimination by minority "probationary" employees and operate more harshly against minorities on the job and in court:

"Merely classifying positions as 'probationary' or 'permanent' does not resolve the hearing question..." (by Justice Rehnquist in Bishop v. Wood, 426 U.S. 426,



344 (1976)).

In 1976 Justice Rehnquist signaled that Bishop would be in direct conflict with other laws and other U.S. Supreme Court rulings. This observation recognizes the long-range, compounding, self-perpetuating, lasting adverse effects of the problem of no hearing falling more harshly on minorities when they are "probationary employees". Minority probationary employees are also denied access to in-house Merit System Grievance Procedures. The inequities in Bishop and Roth provide the foundation for discrimination against minorities during a sort of "twilight zone" period of employment called the probationary period. It leaves minority probationary employees vulnerable to uncontrolled discrimination and dismissal without the protection of law.

Comparing all the law submitted me against the Bishop analogy submitted by Respondents for dismissal to the selection made by both courts, a "picture" of justice out of balance is at (Figure 1):



[illegible]

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The application of incorrect precedents by the Court of Appeals in its judgment of the facts does not correct for the tests and standards foreclosed on by the dismissal of the complaint by the District Court.

Both courts relied on this unilateral set of Bishop, Roth, and Pickering precedents which is unrelated to discrimination. These precedents assert a unilateral notion that a probationary classification, a part of the hiring process, is excluded from the hiring process. When Bishop is applied, it forecloses on the completion of the cycle of the hiring process and the rights of a member of the protected group who is to be protected from discrimination during the hiring process. 42 U.S.C. 2000e-2(a), made applicable to state and local governments on March 24, 1972.

The question of a minority relinquishing his constitutional and civil rights when crossing the threshold of public employment as a probationary employee has not been adequately addressed by the courts.

Bishop, Arnett v. Kennedy, 416 U.S. 134 (1974), and Roth, 408 U.S. 341 (1972) establishes an irrebuttable presumption that a minority, as a probationary, is not a person/citizen and is, therefore, without any protection against discrimination and not entitled to due process rights under the 14th Amendment and laws providing against discrimination under equal protection under the law.

Bishop and Roth contradict the Constitution and previous Supreme Court decisions on discrimination. Bishop and Roth operate more harshly against minorities when they are employed as probationary employees.

Bishop and Roth, provide an illegal argument and legal loophole against claims of discrimination, thereby, providing a basis for future discrimination, under color of law.

In dismissing my complaint, the district court relied heavily on the ambiguous and arbitrary language of Bishop and Georgia State law. Acting together, they are a loop-hole built-into the legal system designed to pro-

tect against mechanism for discrimination. The language of Bishop provides an easy mechanism and an additional tool that is used to circumvent civil rights of minorities when they are in a "probationary" status.

It is obvious that Bishop was enacted to control the number of frivolous personnel actions being placed before the court; however, while accomplishing its purpose, in 1976, in the 1980s it now operates more harshly on minorities as a class.

According to Bishop (and/or Roth), all acts of discrimination are justified because they are merely "incorrect or ill-advised" personnel decisions.

No petitioner/plaintiff argument against discrimination or other wrongful acts can ever survive under a court predisposition that states:

"The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed

to require federal judicial review of every such error....the Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, at 349-50 (1976).

In this context, Bishop is in direct conflict with laws against discrimination, because all discrimination is the result of personnel decisions. And, under the above Bishop rule, incorrect or ill-advised discriminatory personnel decisions are not actionable.

"the fact that the rules and regulations of the State Personnel Board might provide for certain procedures for terminating a 'working test employee' does not mean that plaintiff has a federally-protected interest in assuring that state officials comply with the Board's guidelines."

However, the State Merit System Rules and Regulations (Rule 2.202d, Pg. 7) states:

(Rules) "shall have the force and effect of law and shall be binding upon the state departments covered by the law."

The Merit System Personnel Board establishes the guidelines (Merit System Rules) against discrimination per 42 U.S.C 2000e-2(a) made applicable to state and local governments in 1972. The above statement in Bishop lays

out an impossible course for an employee to follow. The Merit states that the rules, which include anti-discrimination rules, have the force and effect of law and must be followed, but the court says, however, that the officials are not required to "comply" with the rules (App. B). This encourages discrimination that is sanctioned by the courts. The District Court in judgment against Petitioner citing that state officials did not have to comply with the guidelines, states plainly that officials are not required to follow any of the State of Georgia's Merit System Rules (Personnel Board guidelines) since they are established by the Personnel Board constitute the employment contract between the employee and the employer. Not only is it an impossible and conflicting course, it is in direct conflict with the Civil Rights Act and Adams v. McDougal, 695 F.2d 104 (11th Cir. 1982 La.): the term "contract," as used in Civil Rights Act, refers to a right in the promisee against the promisor, with a correlative special duty



in the promisor to the promisee of rendering the performance promised. (See also 42 1981).

A contract (Merit System Rules and Regulations) cannot be binding on one party (the minority probationary employee) and not be binding on the other party (Georgia Official) (Adams v. McDougal, 695 F.2d 104 (11th Cir. 1982 La.)). Bishop and Roth are being used as legal mechanism (barriers) for discrimination. And, in Hamilton v. General Motors, 606 F.2d 576 (5th Cir. 1979) it is stated:

...evaluations by all white supervisors provide a ready mechanism for discrimination."

When compared against the Constitution, there is no distinction allowed for a difference in the rights and treatment of this particular class of minority probationary employee, and when also compared to general and civil rights law, Bishop and Roth are outweighed; however, left to interpretation they provide a legal mechanism used to discriminate against minority probationary employees.

The 5th (11th) Court of Appeals agreed that



the use of the word "or" in Title VII's prohibition of discrimination based on race, color, religion, sex, or national origin evidences the intent of Congress to prohibit employment discrimination based on any or all of the characteristics. In the absence of a clear expression by Congress that it did not intend to preclude protection against discrimination directed especially toward black women (minority probationary employees) as a class, separate and distinct from the class of women and the class of blacks, the court refused to condone a result which leaves black women [minority males] without a viable Title VII remedy. The court utilized the judicial reasoning in the line of "sex plus" cases [see, for example, Barnes v. Costle; Willingham v. Macon Telegraph Printing Company; and Stroud v. Delta Airlines, in support of the proposition that an employer may not single out a portion of the protected class for discrimination. The court remanded. Jefferies v. Harris County Community Action Association, 615 F.2d

1025 (5th Cir. 1980).

Bishop and Roth, coupled with the use of the ambiguous Georgia laws, reinforced by a single ambiguous Involuntary Separation Rule 12.301.1 (App. F, #10) in the State Merit Systems Rules and Regulations, coupled with a special rule (App. F, #32) used by DHR to prohibit the filing of a grievance authorized by the rules (App. F, #s 8, 12-31, 33, and 34) once the employee has been notified of termination overriding the 15 day time period authorized for filing, overrides the preponderance of laws against discrimination. Again, one DHR rule is used to "overrule" twenty three rules of the higher authority, the State Merit System.

With or without considering the questions of property or liberty interest, there can be no such distinction or classifications for minority probationary employees with birth rights under the Constitution; such a distinction is in contravention with the prohibition against classifications in Section 703

(a) (2), Title VII. The 14th Amendment extends itself to persons as citizens by its terms alone. It has been reasoned that Bakke also extended the 14th Amendment to persons-citizens.

"The guarantees of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." (The 14th Amendment is extended to "persons" by Bakke) University of California Regents v. Bakke 438 U.S. 265 (1978).

Being a person, ENTITLED DUE PROCESS has, thus far, been fully extended to everyone and  
everything<sup>1/</sup>except minority probationary employees.

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1/  
Aliens are "persons" within meaning of the Fourteenth Amendment. (Cervantes v. Guerra, F.2d (5th Cir. 1981)).

Aliens, those illegally within territorial boundaries of United States, are entitled to equal protection of the laws; they are presumed to be persons. (Doe v. Plyler, 628 F.2d 418 (5th Cir. 1980 Tex.)).

Non-citizens have a liberty interest. (Hampton v. Mow Sun Wong, 426 U.S. 88 (1976)).

Minors are "persons" and have fundamental rights which state must respect. (Johnson v. City of Opelousas, 658 F.2d 1065 (5th Cir. 1981 La.)).

(V)

THE INVOLUNTARY SEPARATION RULE 12.301.1 IS VAGUE IN ITS MEANING, AND BY PETITIONER'S SPEEDY TERMINATION, ITS' APPLICATION IS ARBITRARY AND FORECLOSED ON 1ST AMENDMENT AND SECTION 704 (A) RIGHTS TO SPEAK AGAINST DISCRIMINATORY TREATMENT AGAINST HIS PERSON

(VI)

NOT BEING ALLOWED ACCESS TO IN-HOUSE GRIEVANCE PROCEDURES IS IN VIOLATION TO SEC. 704 (a), TITLE VII.

(VII)

ROTH, AND PICKERING SHOULD BE OVERRULED, OR REDEFINED, IN THEIR APPLICATION TO PROTECTED GROUP 704 (a) RIGHTS.

(IX)

DISCRIMINATION WAS THE RESULT.

---

1/ Cont.

Corporation (a thing) is a "person" who possesses Fourteenth Amendment due process rights which are protected by federal statute. (Northeast Georgia Radiological Associated, P.C. v. Tidwell, 670 F.2d 507 (5th Cir. 1982)).

Employers are persons. (42 U.S.C. 2000e, (b)).

One or more individuals, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers are persons. (42 U.S.C. 2000e, (a)).

It is the right of every person to express his First Amendment rights concerning his welfare, health, and acts of discrimination against him. This right of expressing grievances is reinforced by the grievance procedures in the contract of employment (See Adams v. McDougal, 695 F.2d 104 11th Cir. 1982, the Merit System Rules and Regulations). Retaliation in the fashion of dismissal is illegal.

With regard to the Appeals Court applying Pickering, to prove a prima facie of violation of First Amendment rights, it must be shown that: (1) The speech or activity is protected under the First Amendment; (2) The protected activity was the motivating factor in the action taken against the minority probationary employee; (3) The action would not have been taken absence the protected Section 704 (a), Title VII activity. Mt. Health City School District Board of Education v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Consolidated School District, 429, U.S. 410 (1979).

The question of whether an activity is pro-

tected under the 1st Amendment and Sec. 704 (a) is a question of law. The remaining two questions, whether the protected activity was a substantially motivating factor in the action taken, and whether the action taken would have occurred absent the activity protected by Section 704 (a), are questions of fact that were never decided. See Schneider v. The City of Atlanta, 628 F.2d 915 (5th Cir. 1980).

The actions that can be violations of an employee's First Amendment rights are those actions which take something away from the employee. See Morey v. Independent School District, 312 F. Supp. 1257, 1262 (D.Minn. 1969), aff'd., 429 F.2d 428 (8th Cir. 1970).

To determine whether an activity is protected by the 1st Amendment, a balancing test is used. The balance that must be struck is between the interest of a public employee, as a person and as a citizen. See Pickering, at 568.

The activities, that are protected activities in this case are: 1. The right to object



to the decision not to upgrade my Planner II position to Planner III as informed upon accepting employment (Submitted to the Court of Appeals in the Record of Excerpts [blue cover] page 18, para 1, and page 24, para 19);

2. The right to object to the hiring of a white female from outside for the Training Coordinator position in an organization whose total population was represented by 88.7% female against that of only 1.95% (App. E) minority male population (Submitted to the Court of Appeals in the Record of Excerpts [gray cover] "E", "F", and "H", to include the graphs and statistics for my Reply, and at the Record of Excerpts [blue cover]);

3. Petitioner's right to object concerning the lack of opportunity to compete for the Director of Management Information Systems and the hiring of a white male from outside and being told, to keep my nose clean and in two years I might be considered for the position. (Submitted to the Court of Appeals in the Record of Excerpts (blue cover) page 23, para 14-15);



and 4. captioned by Petitioner expressing his right to file a grievance with the 15 day filing period concerning the on-the-job injury, the incorrect tenure starting date; to complain of not being afforded the opportunity for the job as the Director of Management Information systems and Training Coordinator for the DFACS, DHR; and defend my request against the oppressive, and adverse personnel decision made by the division's white Personnel Supervisor. (Submitted to the Court of Appeals in the Record of Excerpts [gray cover] "D1" and "24").

A suit brought under discrimination law that alleges discharged from a position because of race and because of opposition to defendant's discriminatory practices cannot be disposed per Bishop. In Corley the 5th (11th) Circuit Court held, that the District Court failed to follow the proper burden of proof because it had not addressed the relevant evidence of pretext. Such evidence is an indispensable element of the Petitioner's case

which must be confronted by the Court. Corley v. Jackson Police Dept, 566 F.2d 994 (5th Cir 1978).

In Williams, a firefighter was engaged extensively in his Section 704 (a) rights, a conduct protected by the First Amendment, which included his filing of affidavit in support of suit challenging city's promotion policies. The firefighter introduced sufficient evidence to create jury question as to whether this conduct was a substantial or motivating factor in abolition of training (probationary) for captain's position and his demotion to rank of lieutenant. [42 1983]. Williams v. City of Valdosta, 689 F.2d 964 (11th Cir 1983).

To establish prima facie case of retaliation for participating in process of vindicating rights through Title VII, a petitioner must only show actions protected by the statute, an adverse employment action, and a causal link between protected actions and adverse employment decision; burden shifts to

Respondents to articulate some legitimate, nondiscriminatory reason for adverse decision. Hamm v. Members of Board of Regents of State of Florida, 708 F.2d 647 (11th Cir. 1983).

Nontenured librarian possessed burden of proof in civil rights action to show that her constitutionally protected conduct under the First Amendment was a substantial or motivating factor in decision not to rehire her. The university was required to demonstrate by a preponderance of the evidence that it would have reached the same decision as to employee's reemployment in the absence of such conduct. [U.S.C.A. Const. Amend. 1]. Montgomery v. Boshears, 698 F.2d 739 (11th Cir. 1983). The court further opined the employer's right to run his business must be balanced against the right of the employee to express his grievances and promote his own welfare. (Also see Adams v. McDougal, 695 F.2d 104 (11th Cir. 1982) (Exs "M", "P", "Q", "R", "S", "S1", "T" of RECORD of EXCERPTS FOR REPLY, and items 14 - 36, Ex "A"/Ex "D", with

REHEARING WITH A SUGGESTION FOR REHEARING EN BANC). Jefferies v. Harris County Community Action Asso., 615 F.2d 1025 (5th Cir. 1980).

In this case and regarding this Petitioner's complaint of retaliation, the Court of Appeals found in Jefferies that there was uncontradicted testimony from both the plaintiff and her supervisor which suggested that plaintiff had notified him of her intent the day before she was dismissed. While the District Court's finding is accurate insofar as no formal notice was received by plaintiff in Jefferies. Petitioner notified the white supervisors of his intent to file a grievance and was discharged before a written grievance could be filed. Formal written "advanced" notice was required in my case per the rules, however, the notice was not signed/sealed/and delivered to Petitioner until the third day after the effective date of Petitioner's dismissal. In Jefferies because the court failed to take into account the informal verbal notice, the court remanded for a decision based

on the entire record. Jefferies v. Harris County Community Action Association, 615 F.2d 1025 (5th Cir. 1980).

An elementary and fundamental requirement of due process in any proceeding under all the circumstances, is to apprise interested parties of the pendency of the action and afford them an opportunity to present their claims. [U.S.C.A. Const. Amend. 14]. Matter of GAC Corp, 681 F.2d 1295 (11th Cir. 1982).

During the term of employment, several memoranda with recommendations for improvement of efficiency and operations of the division's Welfare Budget Planning System were prepared and staffed by Petitioner. Petitioner was openly criticized for criticizing the "dirty laundry" of the DFACS, DHR. These memoranda with recommendations and requests, and speech are most assuredly protected under the First Amendment. Had the evidence been heard, Petitioner is confident that it would have been found that as the result of the memoranda with critical recommendations against DFACS,

the objections to the DFACS supervisors not providing an opportunity for other employment opportunities within DFACS, DHR; the October 5, 1981 memorandum criticizing the Personnel Supervisor for her bad and incorrect decision; all of which combined to make up the discriminatory motive for the Respondents to scheme against Petitioner an irrebuttable discriminatory employment decision of termination.

In a similar 11th Circuit case evidence was sufficient to support a finding that a teachers protected conduct in circulating a letter questioning use of certain earmarked school funds was the sole cause of decision not to renew teaching contracts. Refusal to order reinstatement of the teachers, who had been discharged for exercising her First Amendment rights, was error. [42 1983; Const. Amend 1]. Reinstatement is basic element of appropriate remedy in wrongful employee discharge cases. [42 1983; Const. Amend. 1]. Allen v. Autauga County Board of Education, 685 F.2d 1302 (11th Cir. 1982) In Barnett



evidence was sufficient question as to whether discharge for an improper motive and by means that were pretextual, arbitrary and capricious. [Const. Amend 14]. Barnett v. Housing Authority of City of Atlanta, 707 F.2d 1571 (11th Cir. 1983).

(VIII)

PETITIONER PLACED BEFORE THE COURTS SUFFICIENT PRIMA FACIA INFORMATION/EVIDENCE FOR DISCRIMINATION AND RETALIATION.

(IX)

DISCRIMINATION WAS THE RESULT.

The panel decision is contrary to, and in direct conflict with U. S. Supreme Court decisions on discrimination and uniformity of decisions of the 11th Circuit has not been maintained.

In action challenging Government's allegedly discriminatory administrative action, it is an error to hold Petitioner responsible for any failings of data where almost all data analyzed by Petitioner came from Government (the State of GA documents/information were secured with no assistance from the court), and con-

sidering that the District Court did not allow this Petitioner discovery. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983). In such actions challenging allegedly discriminatory administrative action, shifting burden to the government to establish special qualifications is appropriate when the data necessary to evaluate alleged qualifications is uniquely in the government's possession. Jean v. Nelson, 711 F.2d 1455 (11th Cir 1983).

McDonnell Douglas v. Green set forth the elements of a prima facie case. The 5th (11th) Court of Appeals joined three other circuits in holding that the McDonnell Douglas formulation is applicable to discharge cases. (Flowers v. Crouch-Walker Corp. 552 F.2d 1277 (7th); Garrett F.2d 864 (6th). Thus, the plaintiffs were required to show that 1) they are members of a protected minority; 2) they were qualified for the jobs from which they were discharged; 3) they were discharged; and 4) after they were discharged, their employer filled the positions with non-minority. Inas-

much as the evidence adduced at trials met this test, the court found that plaintiffs had established a prima facie case of discrimination. Marks v. Prattco, Inc., 607 F.2d 1153 (5th Cir.).

In actions challenging administrative action as discriminatory, where proof of impact alone is insufficient, and where a stark pattern of discrimination is not evident, the District and Appeals Courts should have considered "circumstantial evidence" (See App. D) which includes historical background of decision, specific sequence of events leading up to the challenged decision, departures from normal procedural sequence as well as substantive departures, legislative or administrative history, foreseeability of discriminatory impact and availability of less discriminatory alternatives (Petitioner submitted at page 5, Ex "A", with REHEARING WITH SUGGESTION FOR REHEARING EN BANC) provided for by the State Merit System Rules and Regulations vice dismissal per Rules 12.301.1/DHR A.6.a). Jean v.

Nelson, 711 F.2d 1455 (11th Cir. 1983). Had I been white (and assuming that I was wrong and white), the alternatives to dismissal would have been applied (App. F #35-49), but since I am black, immediate dismissal under the IN-VOLUNTARY SEPERATION RULE (App. F # 10 followed by # 32 when an appeal is attempted. Also see App. J1). There are 15 rules that provide for less punitive remedies than dismissal (App F. #35 = 49).

Citing the 5th Circuit's extension of the McDonnell Douglas prima facie case test to discharge cases in Burdine v. Texas Department of Community Affairs, it was held that the plaintiff was required to show that 1) he belongs to a group protected by the Act; 2) he was qualified for the job from which he was suspended and not rehired; 3) he was terminated; and 4) after his termination the employer hired a person not in plaintiff's protected class or retained those having comparable or lesser qualifications. The plaintiff must be afforded a fair opportunity to

establish that the employer's asserted justification is in fact, a "ruse" for a discriminatory decision. If the burden is met,

"our traditional reluctance to intervene in...affairs cannot be allowed to undermine our statutory duty to remedy the wrong."

The plaintiff introduced evidence countering assertions and alleged that he wrote a successful grant proposal, was denied directorship of the program which he proposed contrary to custom, was given inferior working facilities and was relegated to performing menial manual labor in moving to those facilities. Whiting v. Jackson State University, 22 FEP 1296 (5th Cir. 1980). Petitioner was also relegated to performing menial jobs, one of which resulted in an injury requiring two months recuperation. The State fired Petitioner and paid for the hospitalization for the injury.

The four elements of the McDonnell Douglas are not the only ways of proving a prima facie case of racial discrimination in employment. [Civil Rights Act of 1964, 701 et seq., 2000e-

51. Jones v. Western Geophysical Co. of America, 669 F.2d 280 (5th Cir. 1982).

In order to sustain an 1983 action, the plaintiff must make a prima facie showing of two elements: 1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and 2) that the act or omission was done by a person acting under color of law. [42 1983]. Dollar v. Haralson County, Georgia, 704 F.2d 1540 (11 Cir. 1983).

The 5th (11th) court concluded however, that "where the inference of discrimination is supported by a compelling level of racial underrepresentation in a sizeable work force (See App. E for DFACS, DHR stats), the burden of proving lack of qualifications is on the defendant." The court emphasized that in view of the defendant's policy of hiring at low level and unskilled jobs and promoting to upper level positions based upon training received and skills developed at the plant itself, it is fitting that the defendant be



required to carry the burden regarding an alleged lack of qualified blacks in the community. Likewise, management performance appraisals, experience forms and interviews also provide a "mechanism for subjective actions. "This court recognized that promotion systems utilizing subjective evaluations by all white supervisors provide a ready mechanism for discrimination. (Re: Petitioner was denied an opportunity for promotion to the DFACS position as the Director of Management Information Systems, a position that Petitioner was qualified for (App. H), and denied opportunity for Training Coordinator, a position that the Merit System had rated petitioner better qualified than the DFACS requirements (App. I) at Hamilton v. General Motors.

Like the state's Rule 12.301.1 used in conjunction with the DHR Rule A.6.a, the precedents used by the courts to dispose of my case compounds the insurmountable barrier initially created by the rules (Rule 12.301.1 coupled with the DHR special Rule A.6.a) used

to execute my dismissal. Rule 12.301.1 coupled with the special DHR Rule A.6.a. is an insurmountable barrier. The Rule 12.301.1 (App. F, # 10) "except as otherwise provided for by these rules" clause is overruled by a subordinate DHR special rule (A.6.a) which is used to prohibit filing grievances before the expiration of the 15 day filing period (Regulation F, paragraph F. 402.2). Again, one DHR special rule overruled twenty three other rules. This rule [A.6.a] is nothing but a mere tool for discrimination and oppression of speech, under color of law. According to Handley under the insurmountable barrier test, a statutory scheme which makes the status an insurmountable obstacle to the vindication of rights or the receipt of benefits constitutes a denial of equal protection. [Const. Amend. 14]. A law may violate the constitutional guarantee of equal protection when it conclusively denies to one subclass of benefits which are potentially available to others. [Const. Amend 14]. Handley, By and

Through Herron v. Schweikwer, 697 F.2d 999 (11th Cir. 1983)

Once civil rights plaintiff has established discriminatory impact of employment practice, defendant bears burden of proving that the practice is justified by business necessity. [Civil Rights Act of 1964, 701 et seq. as amended 42 2000e et seq]. If civil rights plaintiff successfully establishes prima facie case of disparate treatment, then burden of production, not persuasion, shifts to defendant to articulate some legitimate, nondiscriminatory reason for its actions, and should defendant carry such burden, plaintiff must establish by preponderance of evidence that defendant's nondiscriminatory reasons are pretextual. Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992 (11th Cir. 1982 Ga.).

Within the context of a Title VII action, disparate impact is when practices that are facially neutral, yet fall more harshly on a protected class of employees; employer's intent is not at issue, and a prima facie case

is established by identification of neutral employment practice (Merit System Rule 12.301.1 coupled with the DHR special Rule A.6.a, App. F, # 32) coupled with proof of its discriminatory impact. Plaintiff can also create inference of discriminatory intent by offering other evidence adequate to create an inference that employment decision was based on a discriminatory criterion illegal under Title VII. Eastland v. Tennessee Valley Authority, 704 F.2d 613 (11th Cir. 1983).

Turning to the issue of whether Respondent discriminated against Petitioner (Re: Burdine) in not promoting Petitioner to Director of DFACS Management Information Systems, the court cited the four part McDonnell Douglas prima facie test and found that plaintiff was protected under Title VII from discrimination, that she applied for the Project Director job and was considered, that she was qualified for the job, and that the employer rejected her, and the position remained open and a male was hired. Accordingly, the court concluded that

plaintiff proved a prima facie case of disparate treatment. My case of not being afforded the opportunity for promotion to the position as the Director of Management Information Systems (See Administrative and Officials stats for lack of minorities at App. E) or securing the position as the Training Coordinator for the Division of Family and Children Services (DFACS), DHR was shown by the facts submitted to both courts but was not addressed by either court. The court also noted the Fifth Circuit's additional requirement that defendant prove that those that he hired or promoted were somehow better qualified than plaintiff. Defendants must show by comparative factual data that those hired or promoted from outside of the DFACS, DHR discrimination against black males were (See DFACS stats at App. E) better qualified than Petitioner. "To say that defendant's decision was rational begs the issue; an employer may be rational and still intend to discriminate. Burdine v. Texas Department of Community Af-

fairs, 608 F.2d 563 (5th Cir. 1979)

Under Georgia law, an interest arises whenever a public employee can be terminated only for cause. The DEACS, DHR gives the terminated employee no reason for termination, thereby, protecting themselves, because GA. LAW, 1975, Section 7. Adverse Actions, Appeals and Hearings does not exclude minority probationary employees:

"NO (emphasis supplied) employee of any department who is included under this Act or hereafter included under its authority and who is subject to the rules and regulations prescribed by the State Merit System MAY BE DISMISSED from said department or OTHERWISE ADVERSELY AFFECTED as to COMPENSATION OR EMPLOYMENT STATUS EXCEPT FOR GOOD CAUSE..."

Section 6 (a), Georgia Security Law, requires that a reason be given upon dismissal. There was no reason given for Petitioner's dismissal. Georgia Law coupled with Respondent's Rule 12.301.1/DHR Rule A.6.a is combination designed to eliminate blacks more so than whites. A statute is facially vague in violation of due process only when



the law is impermissibly vague in all of its applications; facial vagueness occurs when a statute is utterly devoid of a standard of conduct so that it simply has no core and cannot be validly applied to any conduct. High Oil' Times, Inc. v. Busbee, 673 F.2d 1225 (11th Cir. 1982 Ga.)

Petitioner's complaint alleged a causal connection between a constitutional violation. Barksdale v. King, 699 F.2d 744 (11th 1983).

With regard to defendants Rule 12.301.1 coupled with the DHR special Rule A.6.a, under disparate impact theory plaintiff must set forth discrete, facially neutral practices that have a more severe impact on protected group than on unprotected group. [Civil Rights Act of 1964, 701 et seq., 703(a)(2), 42 2000e et seq., 2000e-2(a)(2)]. To establish a prima facie case of employment discrimination, plaintiff need only show that facially neutral employment standards operated more harshly on one group than another. [Civil Rights Act of 1964, 701 et seq., 42 2000e et seq.]. Carp-

ter v. Stephen F. Austin State University, 706 F.2d 608 (11th Cir 1983).

Petitioner argued that the rule (Rules 12.301.1/DHR A.6.a.) [App. F] is discriminatory in impact even if that result was not intended. In Griggs the Court noted that Griggs forbids the use of any employment criteria, even one neutral on its face and not intended to be discriminatory, if, in fact, the criterion causes discrimination as measured by the impact on a person or group entitled to equal opportunity. The court found that Title VII forbids the imposition of burdensome terms (See App. F) and conditions of employment as well as those that produce an atmosphere of racial and ethnic oppression. (Re: Use of Rule 12.301.1 and DHR special Rule A.6.a) Garcia v. Gloor, 609 F.2d 156 modified by 618 F.2d 264 (5th Cir. 1980).

Once plaintiff has made a prima facie case, disparate treatment occurs when employer treats some people less favorably than others. (Re: Whittaker v. DHR findings that "proba-

tionary employees are treated differently); because of race, color, religion, sex or national origin; burden then shifts to employer to go forward with evidence of some legitimate, nondiscriminatory reason for employees rejection, and if that is done, plaintiff, who has ultimate burden, is then afforded opportunity to demonstrate by competent evidence that employer's presumptively valid reasons are a coverup or pretext. If employer is silent in face of presumption raised by it, that is, that employer's acts are more likely than not based on consideration of impermissible factors, court must enter judgment for Petitioner because no issue of fact remains in the case. Allison v. Western Union Telegraph Co., 680 F.2d 1318 (11th Cir. 1982 Ga.).

On equal protection grounds if a law threatens fundamental right or impacts upon suspect class, court must strictly scrutinize law and uphold it only if it is precisely tailored to further compelling government interest; if law does not threaten fundamental right or impact

upon suspect class, it must be upheld only if it bears some rational relationship to legitimate government objective. [Const. Amend. 14]. Doe v. Plyer, 628 F.2d 448 (5th Cir 1980).

In employment discrimination cases in which Petitioner is able to prove existence of discriminatory intent by direct evidence, plaintiff is not required to rely on inference of discrimination created by prima facie case of McDonnell Douglas: presumption is created that adverse employment action taken against plaintiff was product of that discriminatory intent and at that point burden shifts to employer to prove by a preponderance of evidence that adverse action would have been taken in absence of discriminatory motive. Perry v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983).

In Burdine plaintiff argued that the District Court erred in failing to address her allegation that she was discriminated against on the basis of both race and sex. The Court of Appeals found that the District Court did

not properly address the issue of whether plaintiff made out a prima facie case under the four part McDonnell Douglas v. Green test nor did it make findings concerning the comparative qualifications of the plaintiff and the selectee. Relying on Burdine, Respondents must prove that those whom he hired were better qualified than the Petitioner. Since the District Court did not make specific factual findings on this issue, the court remanded for proper treatment of the issue based on the existing record. Jefferies, 615 F.2d 1025 (5th Cir. 1980).

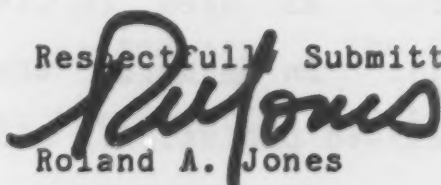
In Webster plaintiff was a probationary public school teacher. The Court, citing Roth, noted that property interests are not created by the Constitution itself, but their dimensions are defined by existing rules or understandings (App. F) Adams v. McDougal, 695 F.2d 104 (11th Cir. 1982), and the term "contract," as used in Civil Rights Act [42 1981]. In Webster the District Court had dismissed plaintiff's allegations of discrimi-

nation. On appeal, Petitioner argued that Griggs and McDonnell applied. The court found that reinstating him as a teacher following his suspension showed lack of arbitrariness. Although plaintiff failed to make his case under both models, the 5th (11th) circuit afforded the opportunity to do so. Webster v. Redmond, 599 F.2d 793 (5th Cir. 1979). The Bishop groupthink syndrome, invoked by Respondents and mandated by the Courts, foreclosed on Petitioner' FULL rights.

#### CONCLUSION

In view of the preponderance of discrimination law and the foregoing points and authorities, and the number of "protected group members" affected, the conclusion is inescapable that Petitioner presents a case in which conflicting decisions in important questions of constitutional and discrimination law should be resolved and the judgment against Petitioner overruled.

Respectfully Submitted,

  
Roland A. Jones



CERTIFICATE OF SERVICE

I certify that I have served 3 copies of  
the foregoing to counsel of record by hand on  
this ~~14~~ day of June, 1984.

*R. Jones*  
Roland V. Jones

83 - 2065  
No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

JUN 15 1984

ALEXANDER L. STEVAS  
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1983

\_\_\_\_\_  
\_\_\_\_\_  
ROLAND A. JONES,

PETITIONER,

v.

DEPARTMENT OF HUMAN RESOURCES (DHR),  
STATE OF GEORGIA, et al.,

RESPONDENTS.

\_\_\_\_\_  
\_\_\_\_\_  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

\_\_\_\_\_  
RECORD OF APPENDICES  
\_\_\_\_\_

ROLAND A. JONES  
PRO SE  
1390 HEATHERLAND DR.  
ATLANTA, GA 30331  
(404) 344-1332

117PP



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## APPENDIX A

### JONES V. STATE OF GA.

GODBOLD, Chief Judge:

Jones, a state employee, brought this action against the Department of Human Resources (DHR) and his supervisors at the department, claiming that his termination violated the First, Fifth, Fourteenth Amendments and 42 U.S.C. Sec. 1983 (1976 & Supp. V 1981). The district court concluded that Jones had no property or liberty interest infringed by his termination and dismissed for lack of jurisdiction. We affirm.

DHR hired Jones as a "working test" employee, meaning that he was a probationary employee for his first six months. State Personnel Board Rules and Regulations 12.301.1 provided that

[a]n employee serving a working test period ... may be separated from his position by the appointing authority or his designee at  
1 record at 132

any time during the working test period. The employee shall be notified in writing in advance of the separation but the separation cannot be appealed except as otherwise provided in these rules. [1] [Points underlined supplied by Petitioner Jones]

Jones reported for work May 18, 1981, but was not credited with starting until June 1, 1981. When he informed his supervisors that this treatment violated the department's regulations, he received no relief. He continued to press this claim as well as other objections to his working conditions, and was fired in October 1981. His supervisors, rather than citing to 12.301.1, cited to another regulation, 11.202A, which arguably only applied to employees who have completed thier working test period.

Jones sued the department and his supervisors. The defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and under Fed.R. Civ.P.



12(b)(6) for failure to state a claim upon which relief can be granted. The district court viewed the complaint as raising only due process and Sec. 1983 claims. The court found the department's action infringed no liberty or property interest and dismissed for lack of jurisdiction.

[1] When a district court has pending before it both a 12(b)(1) motion and a 12(b)(6) motion essentially challenges the existence of a federal cause of action, is for the court to find jurisdiction and then decide the 12(b)(6) motion. *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir.) cert, denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981). Exceptions to this rule exist, however, when "the plaintiff's claim 'has no plausible foundation' or 'is clearly foreclosed by a prior Supreme Court decision.'" *Id.* at 416.

[2] Jones had no property interest in continued employment under Reg. 12.301.1. *Board of Regents v. Roth*, 408 U.S. 564, 92

S.Ct. 2701, 33 L.Ed.2d 548 (1972). While Jone's supervisors apparently referred to the wrong regulation, such a mistake does not create a federal interest where none existed before. Cf. Bishop v. Wood, 426 U.S. 341, 349-50, 96 S.Ct. 2074, 2079-80, 48 L.Ed.2d 684 (1976) (mistakes on personnel decisions not implicating federal constitutional rights do not in and of themselves raise a federal claim). Roth clearly precluded Jone's claim of deprivation of a property interest.

[3] Jones also was deprived of no liberty interest. No impairment of a liberty interest occurs "when there is no public disclosure of the reasons for the discharge." Bishop, 426 U.S. at 348, 96 S.Ct. at 2079. Supreme Court precedent foreclosed this claim of Jones.

[4] Jones stated in his complaint that the dismissal violated his First Amendment rights. However, in his prayer for relief, he refers to the "substantive and procedural 'fair play' and due process ... assured by the First, Fifth, and Fourteenth Amendments." [Footnote

2] The district court did not consider Jone's First Amendment claim when it dismissed for lack of jurisdiction. However, prior Supreme Court cases effectively dispose of this argument. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) established that the First Amendment protects a public employee's statements on issues of "legitimate public concern." Whatever the scope of "legitimate public concern," see *Connick v. Myers*, --- U.S. ---103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), the phrase does not encompass Jone's complaints about his own situation.

Because Jones suffered no impairment of his First Amendment rights or of a property or liberty interest, he has stated no claim under Sec. 1983, which requires deprivation of a "right ... secured by the Constitution and laws."

AFFIRMED.

2. Id. at 57

APPENDIX B

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U.S.D.C. - ATLANTA

MARCH 11 1983  
BEN H. CARTER, CLERK

DEPUTY CLERK

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

ROLAND A. JONES,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	C82-2554A
THE STATE OF GEORGIA,	:	
et al.,	:	
Defendants	:	

ORDER

Plaintiff filed this civil rights action, pursuant to 42 U.S.C. 1983, challenging his dismissal as a "working test employee" [1] of

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<sup>1</sup> Section 45-20-2(16) and (17) of the Official Code of Georgia provides as follows:

(16) "Working test" or "working test period" means the initial period of employment in a class of covered positions following appointment, reappointment, or promotion. During this period, the employee is expected to demonstrate to the satisfaction of the

defendant Georgia Department of Human Resources.

The case is presently before the Court on defendants' motion to dismiss, pursuant to Rule 12(b)(1) and (b)(6), Fed.R.Civ.P., on the grounds that (1) this Court lacks subject matter jurisdiction and (2) that the complaint fails to state a claim upon which relief can be granted. Alternatively, defendants move for a more definite statement of plaintiff's claims, pursuant to Rule 12(e), Fed.R.Civ.P.

This Court would have jurisdiction over plaintiff's claim, that defendants violated the rules and regulations of the State Personnel Board in dismissing him, only if he had a

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appointing authority that he has the knowledge, ability, aptitude, and other necessary qualities to perform satisfactorily the duties of the position in which he has been employed. The working test period will normally be the first six months in the class of positions; provided, however, that the commissioner may fix the length of the working test period for any class at not less than three months nor more than 12 months exclusive of time spent in nonpay status or in an uncovered position.

(17) "Working employee" or "employee on working test" means a covered employee serving a working test period in the class of

"liberty" or "property" interest in his continued public employment to warrant constitutional protection. Board of Regents of State Colleges v. Roth, 408 U.S. 571, 569 (1972). To determine whether plaintiff had a property interest in his employment with defendant Department of Human Resources the Court must look at state law. Bishop v. Wood, 345, 344 (1976).

Personnel Board Rule 12.301.1 of the State of Georgia provides in part that "[a]n employee serving a working test period following appointment or reappointment may be separated from his position by the appointing authority or his designee at any time during the working test period." (Emphasis continued employment. added.) This rule makes clear that a state employer, such as defendant Department of Human Resources, may terminate

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covered positions in which he has been employed; provided, however, that an employee serving a working test period following a promotion from a lower class in which he held permanent status shall retain permanent status rights in the lower class until he attains permanent status in the class to which he has been promoted.



an employee such as plaintiff "at any time during the working test period". Id. The said rules does not restrict the employer's prerogative to discharge a "working test employee" by any language such as "for cause", which might imply a right to continued employment absent a finding of cause for the discharge in question. Accordingly, the aforementioned state rule does not confer on a "working test employee" a property right to

Furthermore, the fact that the rules and regulations of the State Personnel Board (Board) might provide for certain procedures for terminating a "working test employee" does not mean that plaintiff has a federally-protected interest in assuring that state officials comply with the Board's guidelines. As noted by the Supreme Court in Bishop, supra, at 349-50

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitu-

tion cannot feasibly be construed to require federal judicial review of every such error .... the Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Therefore, in view of this Court's finding that plaintiff has no "property" interest in his continued employment with defendant Department of Human Resources, plaintiff's claim is beyond the limited jurisdiction of this Court. Accordingly, defendants' motion to dismiss is hereby GRANTED.

IT IS SO ORDERED, THIS 11th day of March, 1983.

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Marvin H. Shoob, Judge  
United States District Court  
Northern District of Georgia

APPENDIX B1

UNITED STATES DISTRICT COURT      FOR THE  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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ROLAND A. JONES

CIVIL ACTION

DOCKET NO.      C82-2554A

vs.

STATE OF GEORGIA,  
DEPARTMENT OF HUMAN RESOURCES,  
RESOURCES, et., al

JUDGEMENT

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This action came on for consideration before the court, United States District Judge MARVIN H. SHOOB presiding. The issues having been duly considered and a decision having been duly rendered, it is ordered and adjudged.....That Judgement is Entered for the Defendants' THE STATE OF GEORGIA, THE DEPARTMENT OF HUMAN RESOURCES, THE DIVISION OF FAMILY AND CHILDREN SERVICES, DR. L. PATRICIA JOHNSON, individually and in her capacity as the Director of the Division of Family and Children Services, MR. DOUGLAS G. GREENWELL, individually and in his capacity as the Deputy Director of the Division of Family and Children Services, MR. TRUMAN A. MOORE, individual-

ly and in his capacity as the Director of the Administration and Management, MRS. BARBARA G. DEEDY, individually and in her capacity as the Chief of the General Administration Support Unit, MS. DIANA K. FOX, individually and in her capacity as the Chief of the Planning and Evaluation Unit, and against the Plaintiff ROLAND A. JONES for costs of action.

Dated at:  
Atlanta, GA

Date: March 11, 1983

FILED AND ENTERED IN CLERK'S  
OFFICE

March 11, 1983

BEN H. CARTER, CLERK

CLERK OF THE COURT

BY: \_\_\_\_\_  
DEPUTY CLERK

DEPUTY CLERK

APPENDIX B2

FILED IN CLERK'S OFFICE  
U.S.D.C. - ATLANTA

APR 22 1983  
BEN H. CARTER, Clerk

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

ROLAND A. JONES :  
Plaintiff, : CIVIL ACTION  
v. : C82-2554A  
THE STATE OF GEORGIA, :  
et al., :  
Defendants :

ORDER

(NOTE: Underlined remark supplied by Petitioner Jones).

Plaintiff's motion for reconsideration of this Court's order of March 11, 1983, granting defendants' motion to dismiss, and to vacate the judgment, entered on March 11, 1983, is hereby DENIED. Plaintiff's lengthy brief fails to provide any new grounds to disturb this Court's finding that he has no "property" interest in his continued employment with

defendant Georgia Department of Human  
Resources.

IT IS SO ORDERED, this 21st day of April, 1983.

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Marvin H. Shoob, Judge  
United States District Court  
Northern District of Georgia



APPENDIX B3

RECEIVED IN CLERK,S  
OFFICE U.S.D.C. ATLANTA

MAY 24, 1984

BEN H. CARTER, CLERK

FILED IN CLERK,S OFC

U.S.D.C. ATLANTA

MAY 24 1984

BEN H. CARTER, CLERK  
BY:

DEPUTY CLERK

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 83-8370

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ROLAND A. JONES,

Plaintiff-Appellant

versus

THE STATE OF GEORGIA,  
et al.,

Defendants-Appellees.

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Appeale from the United States District Court  
for the Northern District of Georgia  
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Before GODBOLD, RONEY, and TJOFLAT, Circuit  
Judges.

BY THE COURT:

IT IS ORDERED that the Motion of Appellant  
for Relief of Judgment is DENIED.

APPENDIX C

COURT OF APPEALS  
SEVENTH CIRCUIT

MAR 23 1984

SPENCER D. MERCER  
CLERK

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 83-8370

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ROLAND A. JONES,

Plaintiff-Appellant,

versus

THE STATE OF GEORGIA, et al.,

Defendants-Appellees.

- - - - -  
Appeal from the United States District Court  
for the Northern District of Georgia  
- - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR  
REHEARING EN BANC

(Opinion February 24, 1984 , 11 Cir., 198\_\_,  
\_\_\_\_F.2d\_\_\_\_).

Before GODBOLD, Chief Judge, RONEY AND  
TJOFLAT, Circuit Judges.

PER CURIAM:

( X ) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on reharing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Reharing En Banc is DENIED.

( ) The Petition for Reharing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in facor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a pool on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, reharing en banc is DENIED.

ENTERED FOR THE COURT:

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United States Circuit Judge

APPENDIX C1

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 83-8370

Non-Argument Calendar

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D.C. Docket No. C82-2554A

ROLAND A. JONES,

Plaintiff-Appellant,

versus

THE STATE OF GEORGIA, et al.,

Defendants-Appellees.

- - - - -  
Appeal from the United States District Court  
for the Northern District of Georgia  
- - - - -

Before GODBOLD, Chief Judge, RONEY AND  
TJOFLAT, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of

Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appelles, the costs on appeal to be taxed by the Clerk of this Court.

Entered: February 21, 1984

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For the Court: Spencer D. Mercer, Clerk

By: \_\_\_\_\_  
Deputy Clerk

ISSUED AS MANDATE: APR 2 1984

## APPENDIX D

(ATTACHMENT FROM COMPLAINT FILED IN DISTRICT COURT).

### C. SUBSTANTIVE STATEMENTS OF FACTS, CIRCUMSTANCES, AND ALLEGATIONS:

1. In January 1981, complainant was invited by respondent FOX for an interview for a position of Planner II. During the interview complainant was told of the many problems that DFACS was having with its planning and how much the Respondent Commissioner was displeased with the DFACS planning effort. Complainant was told that his background and experiences could "really" help the DFACS overcome its problems with DHR, among other things. Complainant was also told that if hired he could help to improve the DFACS planning system. Complainant was also told that the position for which he had applied for was also to be "upgraded" to a Planner III rating. Complainant provided his resume containing the details pertaining to his knowledge, skills, and abilities. Complainant's background is ground in systems



approach and doing it "right" the first time methods.

2. Later, Complainant was called for an interview with Respondent MOORE. Respondent MOORE was very uncomfortable during the interview. MOORE "squirmed" in his seat and he never looked the Complainant in the eye during the interview. Complainant believes that MOORE did not want to hire him in the first place; However, because the Deputy Director (his boss) at that time was "black" and also retired Army Lt. Col., Complainant believes that MOORE went along with the hiring only because he felt that he had no choice. IT IS STRANGELY COINCIDENTAL THAT THE COMPLAINANT WAS .PN 18 SUDDENLY DISCHARGED SHORTLY AFTER THE "BLACK" DEPUTY DIRECTOR RESIGNED. The word also had it that JOHNSON, the Director of DFACS, was extremely angered because he had resigned.

3. During the interview MOORE also confirmed FOX's perceptions pertaining to the DFACS planning problems and added that the

Commissioner did not like PAT (the Director of DFACS, Respondent JOHNSON) and that the DHR staff, including the Commissioner (Respondent EDWARDS), thought of all DFACS personnel as "just social workers" who did not know what they were doing. Complainant listened and presented his systems approach resume containing his knowledge, skills and abilities and informed Respondents MOORE and FOX that he thought that could improve the unfavorable image that DFACS had with the Department DHR by orchestrating a comprehensive planning system, using sound management practices and principles, and demonstrating, by example, to the Commissioner that DFACS, in fact, did have a "competent" management team.

4. On March 31, 1981, Complainant received a letter from Respondent FOX apologizing for "the continued delay" in filling the position and that a decision was expected by or before April 15, 1981 (EXHIBIT C).

5. Complainant was later called by Res-

pondent FOX and informed that he would be acceptable for the position; however, later Complainant received another call from Respondent FOX and she informed him that there had been a mess up and that Complainant would have to submit another application because they (FOX, MOORE, and DEEDY) had taken too much "interview" time and the register that he was on had expired. Complainant did nothing to cause the delay (January to May).

6. Complainant responded and hand-delivered another hastily prepared application to Respondent FOX. While at the copy machine, making a copy of the application for himself, Complainant told Respondent FOX that he did not understand why he had to go through all of this again since it was not his fault that they had protracted the interview process and allowed the register that he was on to expire. Complainant told Respondent FOX that it was odd that the personnel office should require all of this to be done, again. Respondent FOX stated that they ("they" unknown) are doing"

you" a favor. Complainant responded that he did not feel that he needed a favor since he was on a valid register at the start of the administrative process, and he had done nothing to prolong the interview process beyond the expiration date of the register. This did not seem fair to complainant since the effective date that he entered the systems process was at the time for the first interview, in January, and the chain of the process had continued unbroken; therefore, nothing should change his status because he was already in the system's processes. This was later learned to be a true observation. It did have a "negative" affect on the Complainant in the future. Complainant was later appointed as an "emergency" when, in fact, no emergency existed.

7. Complainant was "again" called by FOX, during mid April, and was told that his time for reporting to work would have to be delayed because DFACS was so far behind in getting the plan finished and submitted to the

Commissioner and that she (FOX) would be away. Respondent FOX stated that the start date of employment would be May 18, 1981, and Complainant agreed.

8. Complainant really believes that since Respondent MOORE did not want him in the division in the first place. Respondent MOORE had just recently reorganized the division and, thereby, reorganized himself and others into high level positions. Respondent MOORE perceived the Complainant as a "possible" threat to his recently acquired status/position, or he perceived the complainant as a "possible" threat to others he had put into positions because the Complainant was "black", a "male", and qualified. Complainant also later observed that Respondent MOORE had alienated many ranking officials in the department of DHR because of his reorganization, among the other things.

9. Complainant "actually" reported to work on May 18, 1981. But Complainant was not given credit for his length of service until

June 1, 1981. This action on the part of MOORE, DEEDY, and FOX was contrary to regulations and Complainant's request.

10. Instead of being placed in the position for which hired (Planner II), upon reporting to work Complainant was immediately thrust into services as a "copy boy" operating the copy machine and as a "messenger boy" delivering parcels to and from the downtown office. Complainant was then, and was never provided an entrance orientation other than introductions to other DFACS personnel.

11. Complainant was "also" taken advantage of and directed to relocate office furniture from the office of another female employee to another office. Complainant was also instructed that he would have to go to the Murphy Avenue Salvage Yard to get his "own" furniture for "his" office. Complainant felt that someone was trying to discourage him into resigning by seeing that he was assigned as many dirty tasks as possible. Complainant, instead of refusing to do the jobs assigned



him, did the first furniture moving job with the help of two other males and he did the second furniture moving job by himself. It should be noted that during the course of these events, Complainant was injured.

12. On June 3, 1981, Complainant's doctor confirmed the injury as a hernia requiring, in his opinion, (radical) surgery. Respondent FOX was advised of the injury on the same day (June 3, 1981) and Complainant requested information concerning time off to get the injury repaired.

13. There was no filing system in the Planning and Evaluation Unit (papers were strewn all around, stacked in boxes, and in piles). Complainant was given boxes and piles of documents by his supervisor (FOX) for him to review and "discover" what his job tasks were to be.

14. On June 10, and because of Complainant's background in computers (five and one-half years - See EXHIBIT A), Mr. Jim Phillips (Director of DFACS Management Infor-



mation Systems Office) requested Complainant's thoughts concerning new systems operations for DFACS. Complainant provided some thoughts EXHIBIT D).

15. On July 1, 1981, a new Director, (White/Male) was hired to be the Director of the DFACS Management Information Systems Office. Complainant wondered why he was not considered concerning his qualifications for that position since his qualifications were known by Respondent MOORE who had input into the hiring of the new White/Male Director. Complainant believes that he was better qualified for the position of DIRECTOR than the white/male who was hired.

16. Throughout Complainant's short lived tenure, Complainant submitted a number of comprehensive proposals to improve the management planning system of the DFACS Welfare operations. Respondent FOX admitted that she did not understand the concepts and techniques contained in the proposals. Respondent MOORE ignored the proposal and didn't bother to

respond to them. Respondent MOORE rebuffed all other improvement proposals made by Complainant.

17. Complainant was also assigned the responsibilities of another female whose job was supposed to be that of organizing and maintaining a project called Resources Management.

18. On August 10, 1981, Respondent FOX also assigned to Complainant an evaluation project that was the work of other unit members (White/females) responsible for administering the program data contained in the project. This project had not been completed by unit staff personnel for over a year prior to the hiring of the Complainant. Even though Complainant did not feel it was rightfully his project, Complainant developed a simplified system to complete the project. Respondent MOORE disapproved of the cost-effective "simplified" method. Respondent MOORE insisted on using the "old" methods of committees, meetings, etc. Complainant ad-

vised Respondents that this would again add to the already delayed project. Respondent MOORE prevailed and the old way was used; however, the planning document that Complainant had initially developed to collect the data was only word smithed by the committee (in a few places) and survived in its original form. Complainant went on to complete this DFACS long overdue and neglected project within a very short period of four weeks. Ironically, his last action concerning this project (a thank you letter to all District Directors) was completed on the same day that he was terminated.

19. During the course of these events, Complainant was again informed that his position of Planner II would be upgraded to Planner III. FOX later informed Complainant that MOORE had changed his mind and it would remain unchanged (not upgraded to Planner III). Why did MOORE go along with Complainants position not being upgraded? Complainant feels that this was another effort engineered to get

him to resign. It followed almost the same pattern that was used to discourage the "black" male, who was in the unit doing the job before the Complainant was hired, into resigning.

20. On August 13, 1981, Complainant's inquiries concerning recruitment for a DFACS position for a Training Program Coordinator were also rebuffed. A Training Program Coordinator is subordinate in position rank to a Training Program Administrator. Complainant was qualified by the State Merit System at a level superior to that of a coordinator (he was qualified as a Training Program Administrator) and was on the System register with a score of 94 out of 100. Yet, he was considered unqualified for the internal DFACS position in favor of a white/female who was hired.

21. As Complainant's discomfort from the on-the-job injury increased, the administrative stumbling blocks were also increased and placed in the path of his securing medical care for the injury. Respondent superiors

would not cooperate and correct, as authorized by the regulations, his "actually" reported for work date which would have provided a few more days of sick and annual leave, but instead insisted that he would be penalized an extra two months (added to his work test period) if he entered the hospital before completing his work test. Complainant still wanted his "true" work test ending date corrected, recorded and counted from the first day that he "actually" reported to work (May 18, 1981), instead of the recorded June 1, 1981 date.

22. Since the "black" Deputy Director had resigned, Respondents DEEDY, FOX and MOORE, rather than make the corrections conspired to terminate the Complainant under the work test rule to conceal their administrative errors against the Complainant pertaining to his initial appointment; to conceal the incorrectness of the so-called "emergency" appointment and to deny Complainant's test period which was to have begun on May 18, 1981 (the day he

actually reported for work) instead of the June 1, 1981 date forced upon him by Respondents; and to conceal the efforts of their other misguided deeds.

23. On October 5, 1981 the content of the "THREE" regulations that stated that the term of employment was to start on the first day that the employee "actually" reported to work was discussed with Respondent MOORE. Respondent MOORE agreed and informed Complainant to advise Respondent DEEDY.

24. On October 5, 1981 during a telephone conversation with Respondent DEEDY, the Personnel Chief (DEEDY) callously informed the Complainant that WHEN HE REPORTED FOR WORK DID NOT MATTER and that his on-the-job time from May 18, 1981 until May 31, 1981, was void and would not count as a part of the work test period and was JUST lost time (tenure and leave time).

25. Complainant informed the Personnel Supervisor (DEEDY) that being appointed in an emergency status was not his fault and that



such an appointment was only for the "administrative convenience" of the division and was damaging to his status (work test period, leave and tenure). Additionally, the Complainant advised the Respondent Personnel Chief (DEEDY) that irregardless of the reasons for the illegal appointment, Rule 11.103 (EXHIBIT B20) and Rule A.302 (EXHIBIT B20.5 ) (Also see Regulation B, EXHIBIT B27) stated that the work test period and the length of service shall begin on the first day that the employee actually reports for work, and that it was not his fault for what they had done wrong. The Respondent refused to acknowledge the facts and stated that "whether or not it was your fault or not doesn't matter." The Complainant advised the Personnel Chief (DEEDY) of his thoughts concerning her callousness and the unfairness of the DHR and DFACS bureaucracy.

26. Complainant was later advised by another employee that he had erred by challenging the Respondent Personnel Supervi-



sor (DEEDY) in her domain and telling her that she was wrong and that "she (DEEDY) will get you.

27. After the callous remarks of the Respondent Personnel Chief (DEEDY) and on the same day (October 5, 1981), by memorandum, and as the result of Respondent's callous remarks, Complainant prepared and sent a memorandum restating his position concerning the rules pertaining to when his work test period and when his length of service should have begun.

28. Respondent DEEDY sent the Complainant a memo (Exhibit E) and quoted to the complainant every "contiguous" paragraph in Rule 11 that she felt could be used as "against" the Complainant. She was, however, presumptuous in concluding that Complainant could not also read and she, therefore, conveniently, did not quote to him the paragraph (11.103) that supported his position from the same chapter and verse that she had used to deny his request (see Respondents memo and

compare it with what is contained in the rule at Exhibit B20). She simply denied Complainant his rights and benefits afforded him by the rules.

29. In the same letter in which she denied him his length of service, tenure, and additional accruable rights based on the provisions of Rule 11 (Rules 11.100 and 11.101) she very conveniently ignored referring to Rule 11.103 which was in my behalf --- "the work test period shall begin with the first day on which the employee actually reports for work." Secondly, no exception is provided for any appointment category, e.g., emergency, regular, etc.

30. Since the Complainant was terminated "only" 18 days later, it appears that the Respondent Personnel Chief (DEEDY) was offended or felt "threatened" by the content of Complainant's memorandum and the facts; and since the "black" Deputy Director was now gone, it is reasonable to presume that this might have been the catalyst that MOORE had

finally set up and waited for it to develop. They jointly moved to terminate him and to restrain his first amendment rights (to shut him up before he could get to the Merit System with his complaint).

31. At this point it should be noted that although the Complainant was only a work test employee and in addition to his being assigned the duties of the other unit employees , he was also unfairly assigned the responsibilities of his supervisor (FOX) during her many periods of absence when there were senior white females in the unit.

32. On October 16, 1981, Complainant's supervisor (his immediate supervisor, Respondent FOX) returned to work. She was advised of the development and DEEDY's refusal to acknowledge and correct the error. Respondent FOX sided with the Respondent Personnel Chief (DEEDY) in spite of the fact of Rule 11.103 and Rule A.302. She even called the Complainant into her office and reprimanded him that it was "unappropriate" (her word) for him

to express his case (referring to the Complainant Telling Respondent DEEDY that she was wrong...) because "She (DEEDY) is very nice".

33. At this point, Complainant advised her (Respondent FOX) that as far as his health and rights were concerned, he did not care how nice she was supposed to be if she was wrong. and that he would always speak up when it came to his family , his health and his rights and that he would have more to say on the subject to others (meaning the Merit System using the grievance procedure).

34. On the same day, October 16, 1981, immediately following the reprimand given by Respondent FOX, Complainant returned to his office and prepared the first draft of his grievance for submission in accordance with regulations. Regulation F.101 (EXHIBIT B29) affords grievance to "all" employees of the classified service. Regulation F202 (EXHIBIT B29.5) also defines a grievance (as applicable to all covered employees) as a claim initiated alleging "his employment has been adversely

affected by unfair treatment... erroneous or capricious interpretation or application of agency policies and procedures or the rules and regulations of the State Personnel Board". Regulation F.402.2 (EXHIBIT 29.55) established that the filing cut-off date and that it must be in writing and delivered to the appropriate superior within 15 days after the occurrence upon which the grievance is founded or within 15 days after the employee became aware of the problem.

35. Complainant was terminated before the 15 day time-limit had elapsed, and was not afforded a chance to submit his grievance.

36. For many years this has been the "trick" that they have used to get rid of people while at the same time , surpressing any Complainant against themselves. They know that regulation F.103c (EXHIBIT B29) states that "employees who have been notified of termination" are presumed not to have a right to file a grievance, therefore, they use the ploy of giving "quick", so-called "advanced"

notice like one day to kill his rights.

37. It is what they did not know or consider is the facts conveyed by the term "occurrence" and the phraseology of "awareness of a problem in paragraph F.402.2 (EXHIBIT B29.55) that are tied to a 15 day time limit....."termination" is an occurrence and it is also the point-in-time of an awareness of a problem; therefore, the 15 day clock continues to tick even after termination.

38. Complainant completed his first and second drafts of his grievance and was prepared to discuss the grievance with his supervisor (Respondent FOX); however, his supervisor avoided her office during office hours from October 19-22, 1981. When Complainant asked of her whereabouts, he was informed that she was downtown in conference with Respondents MOORE and DEEDY; therefore, since Complainant's supervisor conveniently made herself unavailable to the Complainant, and Complainant was unable to submit his grievance within the authorized time limit to his super-



visor.

39. His rights to a grievance were circumvented by Respondent FOX being in secret meetings with Respondents MOORE and DEEDY. Rule F.103 (EXHIBIT B29) establishes that there will be "no reprisals for grievances and requires resolution at the "lowest" possible step --- meaning his immediate and first-line supervisor".

40. Sometime between October 19, 1981 and October 22, 1981, a meeting(s) was held at which time it was decided by Respondents that Complainant's employment would be terminated. By the best information available to Complainant it can be reasonably presumed that the prolonged absence of Respondent FOX away from her office was directly related to the termination meeting(s) and/or arranged to prevent him having the opportunity to file his grievance with his supervisor (FOX). The termination meeting(s) were designed to deny Complainant his grievance opportunity. His termination was "engineered" by Respondent



MOORE, FOX, DEEDY and JOHNSON who convinced themselves, in a vacuum, ("groupthinking") and where they conceived their self-serving "mandate" to "get him".

41. On October 22, 1981, Complainant was called and told to report for a conference with Respondent MOORE. Upon his arrival at MOORE's office, Complainant was greeted by Respondent MOORE and FOX. This was the first time the Complainant had seen Respondent FOX since October 16, 1981. It was at this meeting that Complainant was told by Respondent MOORE that he was being terminated the "very" next day (October 23, 1981) with no additional "advance" notice other than the "hours" being given.

42. Complainant attempted to advise Respondent MOORE and FOX of the facts of the situation concerning the rules and regulations, but was cut short because they had already confirmed their "preconceived notions" to terminate Complainant and had already arranged approval of his release and had al-

ready prepared his notice for release.

43. Complainant was suspicious of their sudden and "one-sided" attitude because he felt that they knew that in accordance with Rule 12.301.1, advance notice, in writing, was required for separation (EXHIBIT B21); this rule does not say what constitutes "advance" notice; therefore, Complainant's rights to be heard, by means of the Respondent's conspiracy and quick action, were "crudely" yet effectively circumvented.

44. On October 22, 1981, at the conference, Complainant was offered the opportunity to resign (Now, why would a lowly work test employee be encouraged/asked to resign?). Complainant refused to resign and stated to Respondent MOORE and FOX that the official reasons for his termination had better be properly stated in the official notification of termination.

45. Also, In violation of Georgia Law, the portion of the official notice of termination was left blank (see EXHIBIT I ).

46. They also ignored and suppressed the following rights provided for by regulations:

Any employee who believes that the rules are working an unnecessary hardship on him, or believes that the efficiency or effectiveness of the service would be improved may petition for relief. (Rule 3.103, Exhibit B11.) I was not given the chance/opportunity to submit a grievance.

47. Complainant returned to his office and continued his duties and because he had been denied the opportunity to present his written grievance to his immediate supervisor and realizing the precarious position in which he had been placed by the Respondents, he dispatched his "intent" of grievance (EXHIBIT F) by the most expeditious means that he could think of in an attempt to protect his right of 15 days. Also upon his departure, Respondent FOX informed Complainant that he could take the rest of the day and the day of termination off.

48. Complainant did not accept the time off and returned to his office and resumed his duties. For the remainder of that day, Respondent FOX avoided her office just as she had

done for the entire week.

49. On October 22, 1981, at approximately 5:00P.M. after everyone else had departed work, Respondent FOX "finally" returned to our office complex. Complainant advised her of how unfair and wrong the pending termination was and informed her that based on his his rights (expressed and implied) contained in the State of Georgia's Merit System Act and the Merit System, Rules and Regulations that he would forget the events of the day and that he would be present for duty on October 23, 1981 and at all times thereafter. Complainant thought that they would see the wrong of their actions and would correct it before any damage was done. Complainant witnessed Defendant FOX making a telephone call.

50. On the same day, October 22, 1981, at approximately 5:30P.M. Complainant received a call from Respondent MOORE. Respondent MOORE "threatened" Complainant with "bodily" removal from the public building by force. Complainant noted the threat without commenting

on it; however, Complainant did ask Respondent MOORE for the reason that he was being terminated. Respondent MOORE responded: "DIANA can't manage things over there." Complainant responded: "Well TRUMAN, you are firing the wrong person then, aren't you?" Respondent MOORE responded: "WE'VE GOT TO PROTECT DIANA". Complainant could not believe what he had just heard. However, Complainant recalled the "high" attrition rate for black males in the Planning and Evaluation Unit just prior to MOORE's reorganization and immediately thereafter. Complainant knew that he had been had by MOORE just like "all" of the "males" before him had been attrited.

51. On October 23, 1981, the effective day of the termination, Complainant was called by the DFACS Deputy Director, Respondent GREENWELL. GREENWELL stated that he wished a conference with Complainant and wished to hear of Complainant's observations. Complainant agreed and the conference was at 2:00.

52. During the conference, Complainant

told the Respondent GREENWELL of his efforts to improve the operation of the DFACS and the planning for the Welfare programs.

53. Also, during this conference, Complainant also showed to Respondent GREENWELL the draft of his grievance that he had prepared a week earlier, but was unable to present to Respondent FOX due to her hiding out at the downtown office all week long.

53.5 An important point to remember is that Complainant worked on just about every weekend during his work test period.

54. At the conclusion of the conference with Respondent GREENWELL, Respondent GREENWELL asked Complainant would he stay on if he could serve in another position in DFACS. Complainant responded with "yes". However, Complainant also advised him that considering the events and the circumstances surrounding the termination efforts of his current management team, it would not be a good idea to serve under the same team." The conference was concluded with Respondent GREENWELL



stating that he could promise nothing, but would see what he could do, and would let Complainant know on Monday (October 26, 1981).

55. At 9:30 A.M. on October 26, 1981, Respondent GREENWELL arrived at Complainant's office and informed him that he was terminated and requested that Complainant leave the building. Respondent GREENWELL provided for assistance in getting Complainant's belongings packed and loaded in his car.

56. Complainant's termination was effective October 23, 1981. However, official written notification of the termination was not provided Complainant until October 26, 1981. Two rules clearly state that a person being terminated "... shall be notified in writing, in advance" (EXHIBITS B20 and B21).

57. At 9:35 A.M. on October 26, 1981, Respondent GREENWELL also discussed the content of what was to be a "series" of official notices of termination (EXHIBIT G). It should be noted that this letter was served on Complainant on October 26, 1981, as confirmation



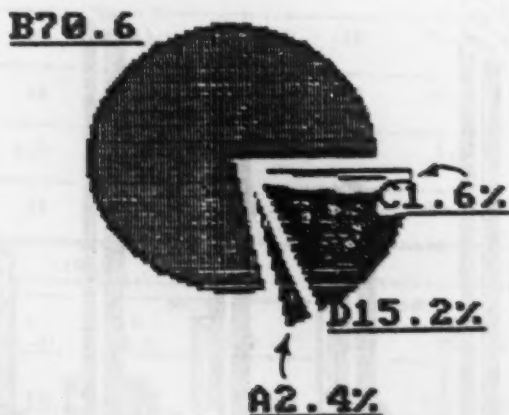
for his termination. The letter stated that your working test dismissal ... was effective on last Friday, October 23, 1981." This statement is, in fact, a retroactive and an illegal dismissal.

## APPENDIX E

(NOTE: EXCERPTS FROM THE MOTION FOR RECONSIDERATION SUBMITTED TO JUDGE SHOOB. CONTAINED MANY OF THE RULES AND REGULATIONS SUBMITTED WITH COMPLAINT, AND THE LENGTH OF THE COMPLAINT WAS COMPLAINED ABOUT BY RESPONDENTS).

SEE CONSOLIDATED FOOTNOTES APPENDED HERETO.

### STATE 1981 OFFICIALS/ADMINISTRATORS



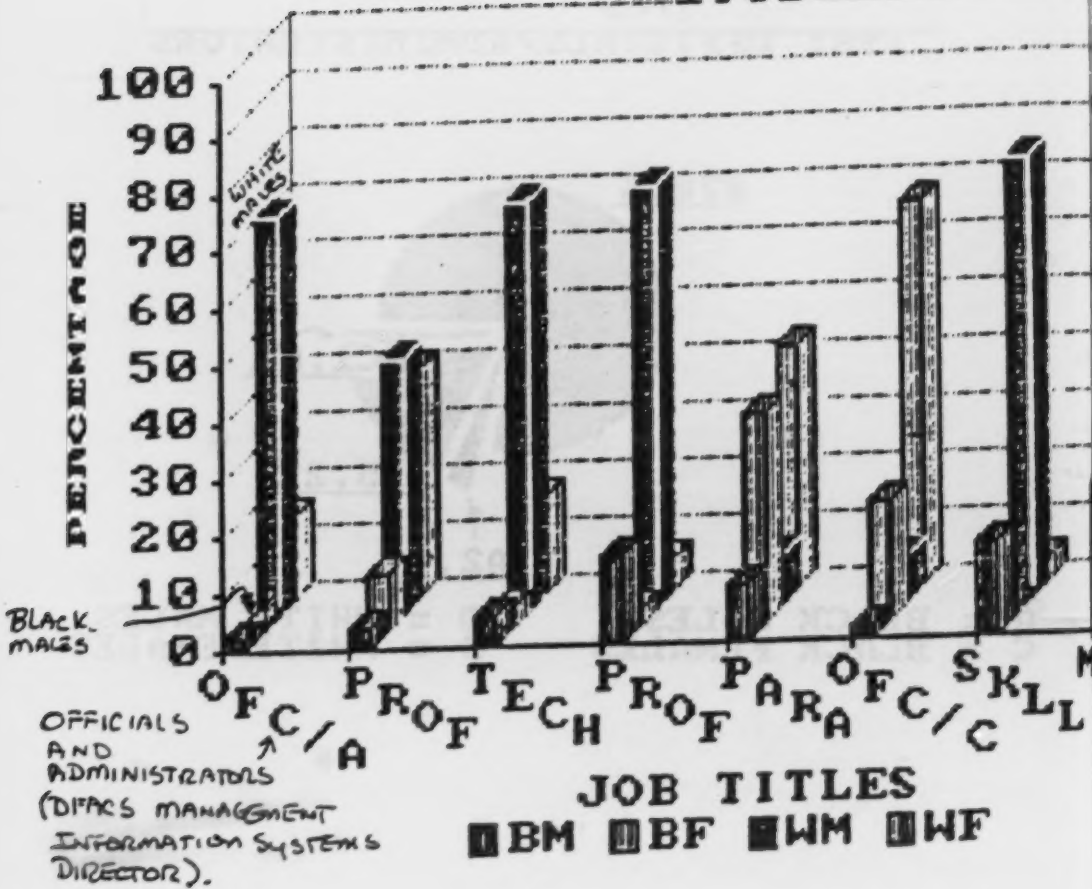
A = BLACK MALES  
C = BLACK FEMALES

B = WHITE MALES  
D = WHITE FEMALES

Figure 2.

# STATE-WIDE CHART

1981



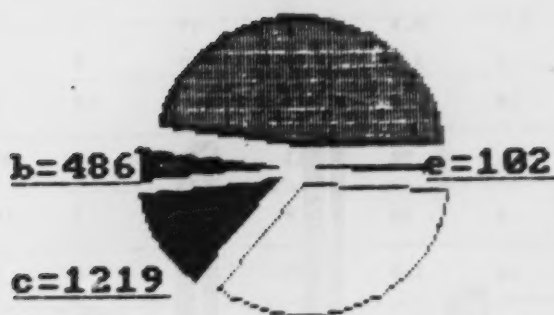
% STATE DISCRIMINATION STAFFING PATTERNS  
 WORKFORCE: 52,143, 28% BLACK=9,567 WOMEN & 5,244 MEN  
 55% OF MAINT/SERV JOBS=BLACKS; 82% BLACKS EARN LESS THAN \$14,500 PER YR.  
 .....

	1979				1980			
	BLACK		WHITE		BLACK		WHITE	
	M	F	M	F	M	F	M	F
OFFICIALS ADMIN.	2	1.3	71	16	2.4	1.6	71	15.3
PROFESS	3.7	8.5	48	39	4	9.5	46	40
TECH	4	3.4	75	17	5	4	74	17
PROF. SVC	14	2	79	4.7	13	2.4	79	5
PARA. PROFESS.	11	38	11	41	10	36.7	9	43.4
OFFICE/ CLERICAL	3	18	9	70	3	19.7	9	68
SKILLED CRAFT	16	1.8	79	3.5	16	1.6	78	4
MAINT./ SERV.	25	28	34.6	11.6	25	29.4	32.7	12

	1981				1982			
	BLACK		WHITE		BLACK		WHITE	
	M	F	M	F	M	F	M	F
OFFICIALS ADMIN	2.4	1.6	70.6	15.2	1.8	1.6	72.3	14.6
PROFESS.	4	10	45	40	4.5	10.7	44	40
TECH.	6	4.5	72	17.3	6	5	70	18
PROF. SVC	16	3.6	74	3.5	18	4	71.5	3.6
PARA. PROFESS.	10.6	37	9.2	42.6	10.6	37	9.3	42
OFFICE/ CLERICAL	2.7	21	8.2	67	2.8	23	7.8	65
SKILLED CRAFT	16.8	2	77	4	17.6	1.6	76	4
MAINT./ SERV.	25.8	30.4	31.5	11.4	26	30	31	12

DFACS

a=4648



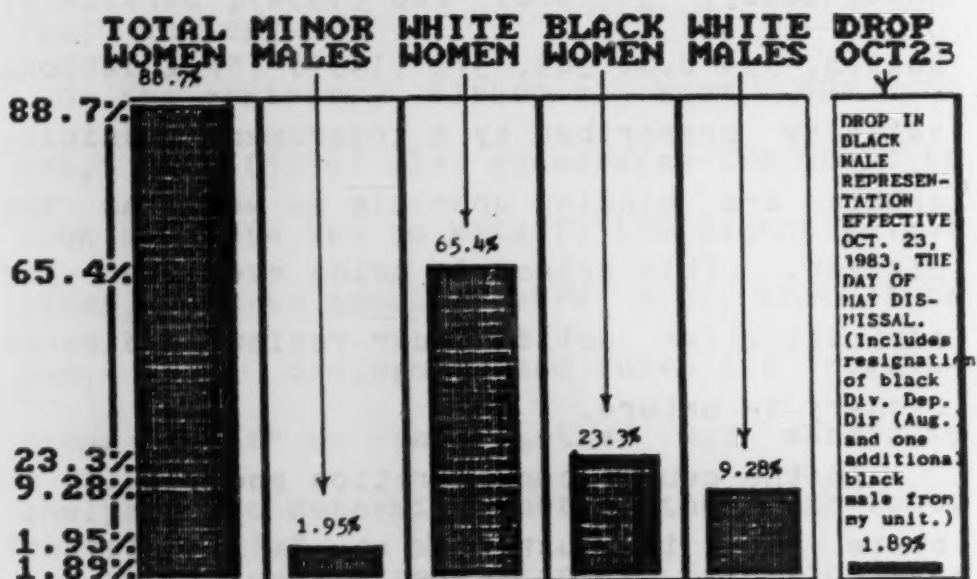
d=3429

A = TOTAL WOMEN  
C = BLACK FEMALES

B = WHITE MALES  
D = WHITE FEMALES  
E = MINORITY MALES

Figure 19.

# DFACS WORKFORCE (AS OF JUNE 30, 1981)



## NOTES:

1. WHITE FEMALE HIRED AS MY REPLACEMENT IN THE PLANNING AND EVALUATION UNIT. UNIT AT 100% FEMALE AFTER TERMINATION OF BOTH BLACK MALES OVER A MONTH PERIOD.
2. WHITE FEMALE HIRED AS TRAINING COORDINATOR.
3. WHITE MALE HIRED AS DIR. MANAGEMENT INFORMATION SYSTEMS.



The rules and regulations and any interpretation of the rules must be consistent with the law. When a rule or regulation is contrary to the law, the regulation is invalid. Interpretation of the rules and regulations that have the effect of law, must be "reasonably" consistent with the *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Service v. Dulles*, 354 U.S. 363, 372 (1957) ("regulations validity prescribed by a government administrator are binding upon him as well as the citizen. This principle holds even when the administrative action under review is discretionary in nature.

In the courts consideration and looking at state law, it must look at "all relevant" state law during the determination process. State law clearly states that "no" employee under the Merit System Act may be subjected to adverse actions affecting 4 status. The law contains no special "qualifiers" for the term (FOOTNOTE 4) "No employee."

Since public officials are expected to

know what the law (rules and regulations are derived from these laws), says they are also expected to know that Bishop does not automatically confer upon them authority that they do not have... they only have the authority that the law gives, no more; Nor does Bishop automatically confer authority of the "Harsh Fact" analogy.

On the contrary, Bishop v. Wood, 426 U.S. 345, 344 (1976) also encourages the Court to look at state law to satisfy the Bishop guidelines, courts should insure, e.g., that state law, local ordinances and rules and regulations "must" be read together and carefully analyzed to determine whether they, in fact, create "mutual" expectations. (Specific "disparate treatments" that were brought:)

1. I was assigned an inordinate volume and a multitude of varied work assignments, including office messenger boy and moving office furniture, and being assigned the work assignments of the white females in the unit; while the white females were allowed to

specialize, or do only one thing, or do nothing.

2. A "working test" implies a presumption of training (FOOTNOTE 5) as a pre-condition for evaluation.

3. Also, being the newest member of the unit and junior to all females in the unit. I was assigned the supervisory responsibilities of my female supervisor (the Supervisor of the Planning and Evaluation Unit), in the absence of the incumbent who was away from her job during most of (FOOTNOTE 6) my "evaluation" test period.

4. Contrary to three different rules, I was not given benefit credit for all of my time spent on the job, 2, 3, and 4, and I was ostracized for asking defendants to correct my record from June 1 to May 18.

5. Although qualified (Exhibit A1), I was not given the opportunity to compete for the position as the Director of Management Information Office, Division of Family and Children Services. I was already on board and they

knew of my qualifications, but a (FOOTNOTE 11) white male was hired from outside of the division.

6. Although better qualified than the job announcement required, I was denied the opportunity to interview for a Division of Family and Children Services Training Coordinator. I was already on board but a white female from outside of the division was (FOOTNOTE 11) hired.

7. By comparison to Mr. Albitz, I find myself similarly situated (1) Mr. Albitz's background is data management based... initially hired as a programmer. (2) My background includes a data management base (Exhibit A1). (3) Mr. Albitz was ostracized and discharged for compiling data and providing it to the EEOC. (4) I compiled data critical of the division's operations, staffed it, (FOOTNOTE 12) and was ostracized for it.

8. The only difference in my situation and Mr. Albitz's situation is that: (1) Mr. Albitz is white and I am black. (2) Mr. Albitz

was discharged and manipulated over a five year period; mine was "orchestrated" in only four months and 23 days.

9. I voiced my dissatisfaction (FOOTNONE 13) concerning why I was not considered for the jobs and why my records were 14 and 15 not corrected and I was ostracized for it.

10. Although the rules and regulations and law permit filing of a grievance while in the system, I was not permitted the opportunity (FOOTNOTE 15,16,17,18,19,20,21, and 21) to file. (FOOTNOTE 25).

11. Considering the Cleopatra syndrome...don't shoot the messenger even if you don't like what he said, (FOOTNOTE 23) upon discharge, I was not permitted to file even though there was a filing "expectation".

12. A disparate treatment discharge/ dismissal/ termination is not authorized. (FOOTNOTE 24) Although the "preponderance" (FOOTNOTES 15,16,17,18,19,20,21, and 22) of the rules permitted grievances and appeals (in-

cluding the discharge itself) ONE SPECIAL PURPOSE RULE was heavily relied on to prevent me from filing a disparate treatment grievance/appeal. I was discharged and not allowed any right to appeal the disparate treatment or the discharge. (FOOTNOTE 25)

13. All black males connected with the operations of the Planning and Evaluation Unit were discharged by the Director of the Office of Administration and Management at one time or another.

14. My discharge, however, was held in abeyance until after the Division of Family and Children Services Deputy Director (a black male...also a retired Lt. Col) resigned to take another position.

15. A top level Merit System Official (black male) who came to my aid was also "forced" out of his position at approx. 6 months after my discharge.

16. I requested a copy of my files. I was denied a copy of documents in my files (FOOTNOTE 26), including the results of my



discrimination complaint that I filed. (Complaint filed with GA Office of Fair Employment Practices after discharge) of I was later provided the one document in my personnel file and "charged" a fee for it.

15. I sought continuing avenues of appeal and employment with defendants and other agencies of the defendant state and was rejected.

16. Although qualified, I was denied an opportunity for a top level job by the Merit System and an entry level job by the Department of Human Resources.

Among others, in addition to the expectation that the work test would be the "standard" six months and plaintiff would have the right to appeal "disparate treatment", the Court must also look at "another" state law (Section 6a, Georgia Employment Security Law) which requires that the employer give "reasons for separations." A reason was not given (Exhibit H).

Standard Operating Procedures (SOP) pat-



terms of discrimination can also be found in the case of Marvin Albitz v. State of Georgia, CA79-634A, and in the Memorandum "Evaluation of Discrimination Charges", dated November 26, 1974. Mr. Albitz (white) prepared this memo and was dismissed almost five years later for its preparation. I was dismissed within weeks of being discriminated against.

#### SUMMARY:

Prima facie for jobs and testing is well settled. By its terms alone, 1983 imposes liability upon every person and prohibits a deprivation of "any" rights and privileges, not only secured by the Constitution, but also "laws".

"every person" who, under color of state law or custom (SOP) "subjects or causes to be subjected, any citizen of the United States...to deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

The Supreme Court of the United States has examined the history and purposes of this section in *Monroe v. Pope*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The Court identified three purposes of this section:

1. The overriding of particular state laws:
2. The provision of a remedy when state law (State House Bill 348 ) (will not be) was inadequate; and 3. The creation of a federal remedy when the state remedy, though adequate in theory, (rules and regulations) was not available in practice."

Likewise, in *Williams v. Codd*, 459 F. Supp. 804 (S.D.N.Y. 1978), 42 U.S.C.A. 1983, which was intended for the protection of personal liberties rather than the protection of property rights with respect to any personal liberties which may have been violated, a plaintiff must show at a minimum:

- a. deprivation of due process, that is, deprivation of the fundamentals of fair play;
- b. discrimination, e.g., discrimination on the basis of race or religion; or
- c. clearly unreasonable, arbitrary, or capricious action. See *Estrban v. Central Mississippi State College*, 415 F. 2d 1077 (1979);
- d. And, it is not necessary to find that

the defendants had any specific intent to deprive the Plaintiff of his civil rights (see *Pierson v. Ray*, 386 U.S. 547 (1967); *Roberts v. Williams*, 456 F. 2d (5th Cir. 1971); *Whirl v. Kern*, 407 F 2d 781 (5th Cir. 1968); *Skehan v. Board of Trustees*, 538 F. 2d 53 (3rd Cir. 1976 (en banc)) *Navarette v. Enomoto*, 536 F. 2d 277 (9th Cir. 1976).

FURTHERMORE, NONTENURED EMPLOYEES, WHILE THEY MAY LACK SUCH "PROPERTY" INTEREST, NEVERTHE-LESS HAVE A "LIBERTY" INTEREST IF "STIGMATIZED" BY THE ADVERSE ACTION AND WOULD THEREFORE ALSO HAVE A DUE PROCESS RIGHT; and being stigmatized varies from one person to another and varies from one "ethnicity" to another. In other words, what is "stigmatizing" for one, may not be stigmatizing to or for another. Due process requirements demand:

1. that an employment decision (including a decision not to employ) which adversely affects the employee not be discriminatory, arbitrary, or capricious;
2. that it be based upon substantial evidence; and
3. that the grounds for the decision bear some reasonable relationship to the nature of the employment.

A conspiracy exists when two or more persons reach an understanding to accomplish some

unlawful purpose, or to accomplish some lawful purpose by unlawful means. The understanding between the members need not be an express or formal agreement. Thus, the existence of a conspiracy may be inferred from a series of events and may be proved by circumstantial evidence (see *Ruthledge v. Electric Hose and Rubber*, 327 F. Supp. 1267 (C.D. Calif. 1971); *Adickes v. S. H. Kress Co.*, 398 U.S. 144 (1970); *Hoffman-LaRoche, Inc. v. Greenberg*, 447 F. 2d 872, 875 (7th Cir. 1971); *El Ranco, Inc. v. First National Bank of Nevada*, 406 F. 2d 1205 (9th Cir. 1968).

42 U.S.C. 1983 provides a private, federal remedy for persons deprived of federal rights under color of state law. And, as addressed earlier, it may be asserted for punitive and compensatory damages and a jury trial.

Public officers are "expected" to know what the law says. A failure of government officials to follow state or local law will constitute a denial of due process if a liberty interest. Damages are available

against an official in his individual capacity. In Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992 (1975), U. S. Supreme Court set forth a formulation for judging an official personally liable for actions taken while discharging his official responsibility:

"...If he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the (individual) affected or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the (individual)." 85 S.Ct. at 1001.

During reconsideration the court is also requested to review the indications of how the so-called rules are straightforwardly, straight facedly, stringently and strategically stratified to solidify my discharge, as a retaliatory discharge is in violation of state rules and regulations, not to mention law: Workmen's Compensation Act and: Albitz v. State of Georgia, CA79-634A, No. Dist. of Georgia; Great American Federal Savings and Loan v. Novotny 60 L. Ed 2d 957 (1979); Hochstadt v. Worchester Foundation, 545 F. 2d

222 (1976); Pantchenko v. C. B. Dolge Co., 581 F. 2d 1052 (1978); Eichman v. Indiana State University Board of Trustees, 597 F. 2d 1104 (1979); Sias v. City Demonstration Agency, 588 F. 2d 692 (1978); Blake v. City of Los Angeles 19 FEP 1441 (1979).

I am requesting that you please reconsider your decision to dismiss my claim, allow it to be amended as follows:

1. Based on the above grounds, reinstate my complaints in its entirety, including my demand for a "jury trial."
2. Withdraw the judgment against me.

(The motion continues with other requests.)

I apologize to the court if I, in any way contributed to the confusion created by the state. My assistant and I are learning and promise to try to do better in the future.

Respecfully submitted,

Roland A. Jones



## CONSOLIDATED FOOTNOTES

2

Purpose of the Merit System Rules and Regulations.

"...To implement and to give effect to the provisions of Article IV, Section 6, paragraph I of the State Constitution of 1976, and of the Merit System Act (Georgia Laws, 1975, p. 79.

3

The Rules and Regulations of the State Merit System have the force and effect of law.

4

GA. LAW, 1975, Section 7. Adverse Actions, Appeals and Hearings.

"No (emphasis supplied) employee of any (emphasis supplied) department who is included under this Act or hereafter included under its authority and who is subject to the rules and regulations prescribed by the State Merit System may be dismissed from said department or otherwise adversely affected as to compensation or employment status except for good cause..."

5

No work test evaluation standards in or by the rules and regulations.

6

Wright v. National Archives and Records Services, 609 F.2d 702 (1979) McDonnell Douglas test for finding a prima facia case "must certainly be adaptable to claims of unequal training opportunities..." (FOOTNOTE 7,8,9, and 10).

7

Merit System Commissioner's Seminar instructions.



In reading the rules and regulations, look for key words: shall/will -- this indicates that the instructions given in the particular rule or regulation must be done. Day -- unless otherwise specified, is interpreted to be a calendar day.

8

WORK TEST RULE 11.103, pg. 37, Merit System Rules and Regulations.

"The working test period shall begin with the first day on which the employee actually reports for work..."

9

SALARY RULE A.302, pg. 56.

"The length of service shall begin with the first day on which the employee actually reports for work..."

10

LEAVE AND HOLIDAY RULE B.201.1, pg. 61.

"The length of service shall begin on the first day the employee actually reports to work;"

11

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), among others.

(a) he is a member of a racial minority,

(b) he was qualified for the position the employer was trying to fill,

(c) although qualified for the position, he was rejected,

(d) the employer continued to seek and hired applicants with complainant's qualifications.

12

Marvin Albitz v. State of Georgia---CA79-634A, No. Dist. Ga.

13  
The First Amendment to the U.S. Constitution.

14  
Rule 14. Appeals and Hearings.

PAR. 14.211. Unjust Coercion or Reprisal. An employee who is subjected to unjust coercion or reprisal because of his participation in an appeal or grievance proceeding authorized by these Rules and Regulations may appeal for relief to the Board as provided in Section 14.100; provided, however, that if administrative remedy for the coercion or reprisal is available through the department grievance procedure as outlined in Regulation F, the employee shall first seek such remedy and may appeal to the Board only at the conclusion of the procedure.

15  
Rule 14. Appeals and Hearings.

PAR. 14.204. Unjust Discrimination Against an Employee. An employee who believes he has been unjustly discriminated against in employment because of political or religious opinions or affiliations, race, color, sex, national origin, age, or physical handicap may appeal to the Board as provided in Section 14.100; provided, however, that if administrative remedy for alleged discrimination is available through the departmental grievance procedure as outlined in Regulation F, the employee shall first seek such remedy and may appeal to the Board only at the conclusion of the procedure.

16  
Regulation F. Employee Grievance Procedure,  
PAR. F. 202

Grievance. A grievance shall be defined as a claim initiated by an eligible employee alleging his employment has been adversely affected by unfair treatment, unsafe or unhealthful working conditions, erroneous or capricious interpretation or application of agency policies and procedures or the Rules and Regulations of the State Personnel Board, or allegations of unlawful discrimination because of race, color, sex, national origin, handicap, age, or religious or political opinions or affiliations.

17

Regulation F. Employee Grievance Procedure.

PAR. F. 402.2. Filing Cut-Off Date. Grievances shall be filed in writing and delivered to the appropriate superior within 15 days after the occurrence upon which the grievance is founded, or within 15 days after the employee became aware of the problem.

18

Rule 14.

PAR. 14.101. Unless a different time period is specifically provided, appeals must be filed within 15 calendar days after: (1) the employee receives written notice of the action or decision; or (2) the effective date of the action or decision, which ever is later.

19

Regulation F. Employee Grievance Procedure.

PAR. F. 203. Filing is the act of an employee notifying the appropriate superior in writing that he is initiating a grievance.

20

Regulation F. Employee Grievance Procedure.

PAR. F.105. Disseminating of Policies and Procedures. The appointing authority of department head shall take reasonable steps to "ensure" that information concerning this Regulation and agency policies and procedures which pertain to grievances and appeals are disseminated to all employees.

21

PAR. 14.212. Other purported violations of the Rules and Regulations. A person who feels that there has been a violation of the Rules and Regulations or the Merit System Law which adversely affects high rights may appeal to the Board under this provision if the appeal right is not covered elsewhere in these Rules and Regulations. The appeal must be filed within 30 calendar days after the occurrence of the alleged violation.

22

Rule 3, Merit System Rules and Regulations.

PAR. 3.102 Petitions to the Board. Any employee in the classified service or other citizens of the state who believes that the rules are working an unnecessary hardship on him...

23

Regulation F. Employee Grievance Procedure.

PAR. F. 105. Improper use of official authority. No person shall directly or indirectly use or threaten to use any official authority or influence to discourage an employee from exercising his rights as provided in this regulation.

24

Rule 3, Merit System Rules and Regulations.

No person shall be appointed or promoted

to, or demoted or dismissed from, any position under the Merit System, or in any way favored or discriminated against with respect to employment under the Merit System because of his political or religious opinions or affiliations; nor shall there be any discrimination in favor of or against any applicant or employee because of race, color, sex, age, physical handicap, or national origin.

25

Section II, A.6.a, DHR Employee Complaint Procedure.

Employees who have been notified of employment termination are not eligible to file a grievance.

26

Rule 3, Merit System Rules and Regulations.

An employee, upon application, may review the contents of his personnel file and copy or duplicate all or any portion thereof during scheduled office hours. While the rules and regulations are improperly enforced to confirm my discharge, they are contravened and "favorably" mixed as "Apples and Oranges" as "not to ruin the career" of a convicted white male (Exhibit I). Other examples of disproportionate and disparate treatment which are indications of "standard operating procedures" for the State (Teamsters v. United States, 431 U.S. 324 - 1977) are provided for your information at page 28, herein.

27

Rule 3, Merit System Rules and Regulations.

Section 3.200. CONFORMITY WITH FEDERAL STANDARDS. As provided in Section 5(b) (3)(i) of the Act these rules and regulations shall conform to the minimum standards for Merit Systems of personnel

administration as specified by those federal departments from which federal funds are obtained for use by the several state departments covered by the law.



## APPENDIX F

### REFERENCES FOR MAIN TEXT NOTES AND MERIT SYSTEM RULES AND REGULATIONS

(Note: All of the below information was submitted to the U. S. Court of Appeals.)

1/ Rule 11, Section 11.100. WORKING TEST:  
"The working test period will be the first six months..."

2/ Reg D.601.1: Retention credits shall be based upon length of service.

3/ Merit System policy as announced by the commissioner: "In reading the rules and regulations, look for key words: shall/will--this indicates that the instructions given in the particular rule or regulation must be done".

4/ WORK TEST RULE 11.103, pg. 37, Merit System Rules and Regulations: "The working test period shall begin with the first day on which the employee actually reports for work..."

5/ SALARY RULE A.302, pg. 56: "The length of service shall begin with the first day on which the employee actually reports for work..."



6/ LEAVE AND HOLIDAY RULE B.201.1, pg. 61:

"The length of service shall begin on the first day the employee actually reports to work;"

7/ Purpose of the Merit System Rules and Regulations: "...To implement and to give effect to the provisions of Article IV, Section 6, paragraph I of the State Constitution of 1976, and of the Merit System Act (Georgia Laws, 1975, p. 79). "The Rules and Regulations of the State Merit System have the force and effect of law."

8/ GA. LAW, 1975, Section 7. Adverse Actions, Appeals and Hearings: "No (emphasis supplied) employee of any (emphasis supplied) department who is included under this Act or hereafter included under its authority and who is subject to the rules and regulations prescribed by the State Merit System may be dismissed from said department or otherwise adversely affected as to compensation or employment status except for good cause..." to my own. (They became upset when I started to object).

9/ No work test evaluation standards in or by the rules and regulations.

10/ Rule 12.301.1. Provides that "The employee shall be notified in writing in advance of the separation but the separation cannot be appealed except as otherwise provided in these rules".

11/ Rule 11.202A: For an employee serving in a working test period, the appointing authority shall notify the employee in writing in advance of the date on which his services are to be terminated.

12/ It is the Policy of the State Personnel Board that every employee eligible to file and employees shall be free to use the grievance without fear of reprisal (Regulation F.103, Pg. 91).

13/ Rule 3, Merit System Rules and Regulations. No person shall be appointed or promoted to, or demoted or dismissed from, any position under the Merit System, or in any way favored or discriminated against with respect to employment under the Merit System because

of his political or religious opinions or affiliations; nor shall there be any discrimination in favor of or against any applicant or employee because of race, color, sex, age, physical handicap, or national origin.

14/ Rule 3, Merit System Rules and Regulations: PAR. 3.102 Petitions to the Board. Any employee in the classified service or other citizens of the state who believes that the rules are working an unnecessary hardship on him...

15/ The Employee Grievance Procedure is applicable to all employees in the classified service (Regulation F.101, Pg. 91).

16/ A person who feels that there has been a violation of the Rules and Regulations of the Merit System Law which adversely affects his rights may appeal (Rule 14.212, Pg. 45B).

17/ "Access to the Grievance Procedure is a Right of employees, not just a privilege." (Para 1, Merit System Special Points Concerning Grievance).

18/ "An employee who believes he has been

unjustly discriminated against in his employment...may appeal to the Board..." (Rule 14, Appeals and Hearings).

19/ Rule 14. Appeals and Hearings: PAR. 14.204. Unjust Discrimination Against an Employee. An employee who believes he has been unjustly discriminated against in employment because of political or religious opinion while the Merit System Rules require filing grievances through the departments or affiliations, race, color, sex, national origin, age, or physical handicap may appeal to the Board as provided in Section 14.100; provided, however, that if administrative remedy for alleged discrimination is available through the departmental grievance procedure as outlined in Regulation F, the employee shall first seek such remedy and may appeal to the Board only at the conclusion of the procedure.

20/ "A person who feels that there has been a violation of the Rules and Regulations or the Merit System Law which adversely affects his rights may appeal...." (Rule 14, para

14.212).

21/ Any employee who believes that the rules are working an unnecessary hardship on him, or who believes that the efficiency or effectiveness of the service would be improved by petitioning the Board (Rule 3.103, Pg.9).

22/ "A grievance shall be defined shall be defined as a claim initiated by an eligible employee alleging his employment has been adversely affected by unfair treatment...erroneous or capricious interpretation of agency policies and procedures or Rules and Regulations...or allegations of unlawful discrimination..." (Regulation F.202).

23/ Rule 14. Appeals and Hearings: PAR.  
14.211. Unjust Coercion or Reprisal. An employee who is subjected to unjust coercion or reprisal because of his participation in an appeal or grievance proceeding authorized by these Rules and Regulations may appeal for relief to the Board as provided in Section 14.100; provided, however, that if administrative remedy for the coercion or reprisal is

available through the department grievance procedure as outlined in Regulation F, the employee shall first seek such remedy and may appeal to the Board only at the conclusion of the procedure.

24/ Regulation F. Employee Grievance Procedure: PAR. F. 105. Improper use of official authority. No person shall directly or indirectly use or threaten to use any official authority or influence to discourage an employee from exercising his rights as provided in this regulation.

25/ Appeals must be filed within fifteen (15) calendar days after: (1) the employee receives written notice of the action or decision; or (2) the effective date of the action or decision, whichever is later (Rule 14.100).

26/ Rule 14. PAR. 14.101. Unless a different time period is specifically provided, appeals must be filed within 15 calendar days after: (1) the employee receives written notice of the action or decision; or (2) the effective date of the action or decision, which ever is



later.

27/ Regulation F. Employee Grievance Procedure. PAR. F. 203. Filing is the act of an employee notifying the appropriate superior in writing that he is initiating a grievance.

28/ Regulation F. Employee Grievance Procedure. PAR. F.105. Disseminating of Policies and Procedures. The appointing authority of department head shall take reasonable steps to "ensure" that information concerning this Regulation and agency policies and procedures which pertain to grievances and appeals are disseminated to all employees.

29/ Regulation F. Employee Grievance Procedure. PAR. F. 402.2. Filing Cut-Off Date. Grievances shall be filed in writing and delivered to the appropriate superior within 15 days after the occurrence upon which the grievance is founded, or within 15 days after the employee became aware of the problem.

30/ The Employee Grievance Procedure is to provide an orderly process for reaching a fair and equitable decision in a timely manner,



with his immediate supervisor, before a written grievance is filed (Regulation F.102, Pg. 91).

31/ PAR. 14.212. Other purported violations of the Rules and Regulations. A person who feels that there has been a violation of the Rules and Regulations or the Merit System Law which adversely affects high rights may appeal to the Board under this provision if the appeal right is not covered elsewhere in these Rules and Regulations. The appeal must be filed within 30 calendar days after the occurrence of the alleged violation.

32/ Sec. II, A.6.a, DHR Employee Complaint Procedure. Employees who have been notified of employment termination are not eligible to file a grievance.

33/ RE: "M", R. GRAY COVER: 1."Refusal to allow reasonable time to process a grievance is appealable." 2. "Refusal to hear a legitimate grievance is an appealable offense." 3. Any of the items listed as non-grievable become grievable if discrimination is charged or

if unjust coercion and reprisal is charged."

4. "Any disciplinary action, even if reasonable and justified, is grievable unless it is an adverse action. (Then it is appealable)".

34/ Rule 3, Merit System Rules and Regulations. An employee, upon application, may review the contents of his personnel file and copy or duplicate all or any portion thereof during scheduled office hours.

RULE 12.301.1. INVOLUNTARY SEPERATION USE FOR BLACKS.

THE FOLLOWING ARE USED FOR WHITES:

35/ A working test employee may be demoted because of permanent status not being recommended (Rule 10.304.1, Pg. 34).

36/ Transfer the working test employee at any time from another position of the same class or from a position of a comparable class (Rule 10.201).

37/ Transfer the working test employee to

any vacancy of the same class (Rule 10.202).

38/ Transfer the working test employee to any vacancy of the comparable class as if the vacancy were of the same class (Rule 10.303).

39/ Demote the working test employee to a lower class (Rule 10.303 ).

40/ Demote the working test employee for unfitness to perform assigned duties, negligence or inefficiency, or for misconduct or insubordination, or whenever the appointing authority deemed it necessary by reason of shortage of work or funds or reorganization (Rule 10.304.1 ).

41/ Suspend the working test employee without pay for disciplinary purposes (Rule 12.502.2).

42/ Relocation of the working test employee (Rule G.302).

43/ Or for even more "serious" infractions, an employee serving a working test period following appointing may be suspended for disciplinary purposes and for more serious purposes such as pending civil or criminal court action (Rule 12.502.2, Pg. 41).

44/ "The requisites of fairness, promptness, and legal sufficiency can usually be satisfied by the disciplinary process known as "Progressive Discipline".(Appendix D, Pg. 111).

45/ "The usual sequence is oral reprimand, written warning, suspension, dismissal. Each step, therefore, moves closer to termination..." (Appendix D, Pg. 111).

46/ "... being careful to observe the procedural requirements..." (Appendix D, Pg. 112).

47/ "... the procedural requirements are critical and must be rigorously observed as a matter of law." (Appendix D, 3c, Pg. 112).

48/ "The importance of adhering to the procedures cannot be stressed too strongly as a deficiency in any respect may result in the action being reversed on appeal..." (Appendix D, page 113).

49/ "None of these actions, therefore, should be initiated without prior consultation with the Personnel Officer or other knowledgeable official." (Appendix D, Pg. 113).

## APPENDIX G

### (EXCERPTS) COMMISSIONER'S SEMINAR

Conducted By

Carson Melvin, Director  
Division of Payroll Audit and Program Evaluation

#### RULE 3. GENERAL PROVISIONS

Prior to discussing the actual provisions of Rule 3, Carson Melvin gave a general overview of the rules and regulations. In this overview, he made some pertinent points in relation to reading and understanding the rules and regulations. They were:

1. The Rules and Regulations of the State Merit System have the force and effect of law.

2. Georgia is a common law state, that is to say one cannot act just because there is no prohibition in the law against the act. One has only the authority that the law gives, no more.

3. Public officers are expected to know what the law says.

4. There are several points to consider in reviewing the rules and regulations:

a. Where the rules are direct, take it for what it says; there should be no interpretation given.

b. Consider the intent of the rule.

c. Consider the above mentioned number one and two together.

d. The rules and any interpretation of the rules must be consistent with the law. When a rule or regulation is contrary to the law, the regulation is invalid and the law stands.

e. Interpretation of the rules and regulations must be reasonably consistent with the law.

f. The current interpretation and opinions on the rules and regulations are all included in the Commissioner's Opinions, number 78-1 through 31 (we should all have copies of these).

g. In looking at an interpretation on the rules and regulations, the courts of law do tend to rule in favor of the interpretation that preserves the rule, in preference of an

interpretation that destroys the rule.

h. In reading the rules and regulations, look for key words--

1. and--this infers a conjunctive, indicating that there are two conditions.

2. or--this is a disjunction which indicates an alternative.

3. shall/will--this indicates that the instruction given in that particular rule or regulation must be done.

4. may--denotes a choice.

5. day--unless otherwise specified, is interpreted to be a calendar day.

#### SECTION 3.100 APPLICABILITY, EXTENSION, AMENDMENTS, EFFECTIVE DATE

PAR. 3.101. Applicability. These rules and regulations apply to classified positions only.

PAR. 3.102 Extension. This section specifies that when by either Executive Order or Legislation, a non merit agency is made merit, those affected employees are considered to be



on interim appointment. They are not subject to the provisions of the rules and regulations until the Personnel Board establishes a regulation that provides for them to come fully under the Merit System. An interesting note here was that, when these agencies are blanketed under, we do not require that the employees meet our current specification for the job. If an employee has been working for 4 months, that 4 months is considered to be 4 months toward his 6 months working test. Additionally, in the event of a reduction-in-force, the time considered for these employees is only the time under the classified service.

PAR. 3.103. — Petitions to the Board. This provides that any citizen or any classified employee may petition the Board if they believe that the rules are working an unnecessary hardship on him/her. Their petition to the Board will be generally considered on the written record only, therefore, an individual who is petitioning must be sure that what they have in writing expresses fully

what they would like to be considered.

It appears that most people assume that the Pendleton Act began most Merit Systems in the various States. However, the beginning of most Merit Systems was a direct result of the Social Security Act of 1934. It provided basically that agencies administering their programs should operate under a merit type system.

#### SECTION 3.200 CONFORMITY WITH FEDERAL STANDARDS

The Rules and Regulations of the State Merit System must conform to the minimum standards for a Merit System set-up by federal departments from which we receive federal funds. This is most applicable to the grant-in-aid agencies.

#### SECTION 3.400 PENALTIES

Of much interest to me, in this provision is the fact that Carson referred to this section as basically a paper tiger. This section of Rule 3 specifies that anyone who knowingly and willfully violates the provisions of these

rules and regulations shall be guilty of a misdemeanor and conviction shall be punished as for a misdemeanor and for a period of five years thereafter be ineligible for appointment to or employment in a position in the State service. Carson explained that the Georgia Supreme Court has held that administrative agencies cannot make misdemeanors and the legislature cannot delegate the authority to these agencies to make misdemeanors. This is an exercise of the legislature only. This does not, however, negate the fact that an employee can be terminated and later prosecuted. There are some specifics in the Georgia Code that do provide for punishment, specifically Georgia Code 26-2311 and Georgia Law 1977, Act 246. Both specify and both apply to employees in State Government who are merit as well as non merit. One very interesting site in the 1977 Act 246 relates to the altering of documents. The penalty for that is imprisonment for not less than 2 and no more than 10 years.

## SECTION 3.700 EMPLOYEE COMPLAINTS

This section made the foundation for Regulation F-Grievance Procedure. This establishes that every department shall comply with this provision, and set forth a mechanism for hearing and resolution of employee's grievances.

PAR 3.901 Prohibits unlawful discrimination.

# APPENDIX H

CAUTION: NOT TO BE USED FOR IDENTIFICATION PURPOSES

THIS IS AN IMPORTANT RECORD SAFEGUARD IT

ANY ALTERATIONS IN SHADED AREAS RENDER FORM VOID

DD FORM 1 JUL 79 214		PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.		CERTIFICATE OF RELEASE OR DISCHARGE FROM ACTIVE DUTY																																									
1. NAME (Last, first, middle) JONES, ROLAND ALEXANDER		3. DEPARTMENT, COMPONENT AND BRANCH ARMY-RA-INF		2. SOCIAL SECURITY NO. 232   52   3133																																									
4a. GRADE, RATE OR RATE LTC	4b. PAY GRADE O-5	3. DATE OF BIRTH 370329	4. PLACE OF ENTRY INTO ACTIVE DUTY Bluefield, WV																																										
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13. DECORATIONS, MEDALS, BADGES, CREATIONS AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (All periods of service) NDSM, Sr Prcht Badge, CIB, AFEM, AM, ARCOM, VSH w/3 BS, VCM w/60 DEV, VCG w/Palm, BSM, 3 O/S Bars, MSM, JSCM, ROK PUC																																													
14. MILITARY EDUCATION (Course Title, number months, and month and year completed) BS Tech Sci WV State Col (1959), IOBC, (1959), Abn, (1959), CINSRGY/SP War Stf Off Crs, (1963), SF Off Crs, (1963), Air Trans Plan Crs, (1963), Jumpmaster Crs, (1964), IOCC, (1966), USACGSC, (1977), Business Adm, George Washington Univ., (1968), MA, Mgt, Central Ill Univ (See Item 18)																																													
15. MEMBER CONTRIBUTED TO POST-VIETNAM ERA VETERAN'S EDUCATIONAL ASSISTANCE PROGRAM <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO		16. HIGH SCHOOL GRADUATE OR EQUIVALENT <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		17. DAYS ACCRUED LEAVE PAID 42 1/2																																									
18. REMARKS Item 14 (cont): (1979), Computer Orien for Exec, (1978), Computer System Security, (1979). Nothing follows.																																													
19. MAILING ADDRESS AFTER SEPARATION 1390 Heatherland Dr, SW Atlanta, GA 30331				20. MEM-360 REQUESTS COPY & BE SENT TO GA <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO																																									
21. SIGNATURE OF MEMBER BEING SEPARATED <i>[Signature]</i>		22. TYPED NAME, GRADE, RATE, AND SIGNATURE OF OFFICER AUTHORIZED TO SIGN KENNETH E. SMITH, CW2, USA, ASST-ADJ																																											

47. 0132-UP-000-3140

MEMBER - 1

BEST AVAILABLE COPY

## APPENDIX I

STATE MERIT SYSTEM OFFICIAL NOTICE OF EXAMINATION RESULTS.

OUR RECORDS SHOW THAT YOU HAVE APPLIED AND BEEN EXAMINED FOR THE FOLLOWING JOB CLASSES. THE RESULTS OF THESE EXAMINATIONS ARE:

JOB CLASS TITLE	GRADE	V.P. POINTS	FINAL SCORE	EXAM TYPE
TRAIN PROGRAM ADMINISTRATOR	84	10	94	(3)

EXAMINATION TYPES ARE: 01/28/81 232 52 3133

- (1) WRITTEN MULTIPLE CHOICE TEST.
- (2) PERFORMANCE TEST OF SPECIFIC SKILLS.
- (3) EVALUATION OF YOUR TRAINING AND EXPERIENCE ON YOUR APPLICATION OR QUESTIONNAIRE.
- (4) REGRADED FROM PREVIOUS TEST SCORES.

JONES, ROLAND A  
1390 HEATHERLAND DR  
ATLANTA, GA 30331

NOTE: EXAM SCORES ARE VALID FOR TWELVE MONTHS.



APPENDIX J

MAILGRAM SERVICE CENTER  
MIDDLETOWN, VA. 22645

4-0300743295002 10/22/81 ICS IPMMTZZ CSP ATLB  
1 4048944400 MGM TDMT ATLANTA GA 10-22 0146P  
EST

ROLAND JONES  
1390 HEATHERLAND DR  
ATLANTA GA 30331

THIS MAILGRAM IS A CONFIRMATION COPY OF THE  
FOLLOWING MESSAGE:

4048944400 MGM TDMT ATLANTA GA 10-22 0146P  
EST

ZIP  
TRUMAN MOORE  
47 TRINITY AVE STATE OFFICE BLDG  
ROOM 414-S  
ATLANTA GA 30334

DEAR MR MOORE

PLEASE BE ADVISED THAT THIS IS MY INITAIL  
NOTICE OF GRIEVANCE. DETAILS WILL BE PROVIDED  
WITHIN THE LEGAL TIME FRAME ALLOWED.

I WILL BE PRESENT FOR DUTY ON MONDAY OCTOBER  
26 1981 AS USUAL.

ROLAND A JONES

APPENDIX J1

November 13, 1981

Mr. Roland Jones  
1390 Heatherland Drive, S. W.  
Atlanta, Georgia 30331

Dear Mr. Jones:

We received your notification of October 22, 1981 indicating your grievance. We requested guidance from the DHR Office of Personnel Administration as to how we should proceed.

The Office of Personnel Administration referred us to Section II, A.6.a of the DHR Employee Complaint Procedure, which reads:

Eligible Employees

The Employee Complaint Procedure is intended for, and may be used by any full-time DHR Employee or part-time DHR employee who works 20 hours or more per week. This includes both Merit System classified and unclassified employees. Employees who have been notified of employment termination are not eligible to file a grievance.

In light of this information, it appears that your grievance is no longer possible. We

trust this communication will clarify for you that we cannot process your grievance.

Sincerely,

Douglas G. Greenwell  
Deputy Director  
Division of Family and  
Children Services

(Note: State Merit System Regulation F makes no mention of notification of termination terminates grievance rights. It does, however, state in (See App. F#) Regulation F.103 (F#15) "employees shall be free to use the grievance without fear of reprisal", Regulation F.402.2 (F#32) 15 days after occurrence or when employee became aware of the problem, Rule 14.100 (F#28) fifteen calendar days from receipt of written notice or the effective date of the action or decision, which ever is later, Rule 14 PAR 14. 101 (F#29) 15 days....., Rule 14.212 (F#34) 30 calender days after occurrence, and Appendix J2, F.400, 1[b] provides 60 days to complete the process).

## APPENDIX J2

(NOTE: FROM MERIT SYSTEM)

### Some Special Points Concerning Grievances

Access to the Grievance Procedure is a Right of employees, not just a privilege. Any attempt on the part of a supervisor to persuade an employee not to file a grievance, either directly or indirectly, is prohibited and is a grievable and appealable offense. (Under Rule 14.212 - Other purported violations of the Rules and Regulations)

When a subordinate announces the intention of filing a grievance, your role is to make a reasonable effort to gain a clear understanding of the complaint and to attempt to achieve resolution to the problem. If you will not or cannot grant the relief requested by the grievant, you can offer an alternative relief or a partial relief (which the grievant is free to accept or refuse) [PETITIONER CANNOT BE FIRED FOR NOT ACCEPTING] or you can submit an answer in writing stating your reasons for not granting the relief.

Even if the employee's grievance is unreasonable from your perspective, it is best to allow the grievance to be filed without interference. The hearing officer can rule on the reasonableness of the request. Harassment or intimidation should be avoided altogether, along with any retaliatory actions following the filing of the grievance. Refusal to allow employee a reasonable time to process a grievance is appealable.

If you feel that the matter being grieved is not grievable under Regulation F, it is best to seek the opinion of a higher authority before refusing to accept a grievance. If necessary, call the Employee/Management Relations Unit of the Merit System for advice. Refusal to hear a legitimate grievance is an appealable offense.

If the appointing authority and the grievant do not concur concerning the admissability of a grievance, an appeal can be avoided by seeking an opinion in writing from the Merit System Commissioner. Either party

or the Employee/Management Relations Unit can request such a Commissioner's Opinion.

Some points to remember about the grievable and non-grievable matters are as follows:

1. Any of the items listed as non-grievable become grievable if discrimination is charged or if unjust coercion and reprisal is charged. For example: an employee who failed to get a promotion shortly after filing a grievance could grieve not getting the promotion.

2. Although the rating and content of an ROP are not grievable, the manner or circumstances of preparation are grievable. Example: Supervisor of only two months rating an employee's performance for the whole year. Example: Supervisory worked in another building and never observed employee's performance. These items are grievable under unfair treatment.

3. If a salary increase or promotion is denied, based on a poor ROP, the ROP becomes



grievable.

4. Denial of a salary increase is always grievable.

5. Any disciplinary action, even if reasonable and justified, is grievable unless it is an adverse action. (Then it is appealable.

#### PAR. F.104 Non-eligible Employees

\*Up to four categories of employees may be excluded from the grievance procedure at the discretion of the appointing authority.

\*Note, however, that the permissible exclusions are class exclusions --not personal exclusions. You cannot permit some temporary employees to file grievances, for example, and deny the right to others who are also on temporary appointment.

\*Any classified employee that does not fit into one of the four categories cannot be excluded from the grievance procedure [cf.: Par. F.101].

\*Any category of employees that the appointing authority decides to exclude from the grievance process should be listed in the

procedure that is filed with the Commissioner as provided in Par. F.401.

PAR. F.105. Improper Use of Official Authority

\*The wording of this paragraph is very broad and the message is plain: Don't try to stop grievances by using or threatening to use any authority or influence, either directly or through others. A promise of reward [promotion, choice assignment, better shift, etc.], for example, is just as much a violation as a threat of sanctions.

\*Employees may appeal violations of this paragraph under Par. 14.212.

PAR. F.106. Dissemination of Policies and Procedures

\*Reasonable steps to disseminate grievance information to employees include such things as posting on bulletin boards, publication in departmental newsletters and handbooks, description in orientation courses, etc. It is not necessary nor required that each employee be given a personal copy of the regulation or the departmental procedure.

## SCT. F.200 DEFINITIONS

\*There are seven definitions; most are self-explanatory.

\*There are four essential elements in the definition of a grievance [Par. F.202]. These are:

1. eligibility - the employee must be eligible to file a grievance [see Par. F.104 and Par. F.301].

2. personal employment interest - it must be his [or her] employment that is affected. If only a co-worker is affected, that's tough! If only his home life is affected, that's also tough. To meet the definition of a grievance the condition must affect the individual's personal employment.

\*F.301.G. - There is an important qualifier here; namely, if the employee can show that the selection of an individual for promotion, etc. is in violation of the agency's own written policies or the Merit System Rules on filling vacancies, he may file a grievance on a selection that is adverse to his employment

interests. Agencies should therefore review any written policies on selection that are now in effect and revise or abolish as necessary to prevent pointless grievances.

\*F.301.I. - Note that the exclusion of adverse actions is keyed to Par. 15.101 which defines adverse actions in relation to permanent employees. If, then, employees who are not on permanent status are suspended without pay, etc., the grievances may be legitimate.

#### SCT. F.400. GENERAL PROVISIONS

\*This section requires each department to establish a grievance procedure and submit it to the Commissioner or Personnel for approval as to conformity with the Regulation. Some features are mandatory, others are optional.

\*The procedure must include the following provisions:

1. definite steps in processing grievances  
- the number of steps is not specifically prescribed but it cannot be less than two; i.e., the hearing forum [either a Panel or a Hearing Officer], and the final decision by

the appointing authority.

[a] Usually, the first step is the official with whom the grievance is first filed [this may or may not be the immediate supervisor]; then one or more steps at which the grievance is reviewed by higher level officials, if requested by the grievant; then the Hearing Panel or Hearing Officer; and, finally, a decision by the appointing authority.

[b] It may be somewhat obvious to suggest that there should be enough steps in the procedure but not too many. More specifically, there should be enough steps to suit your organization and no more. Keep in mind in establishing the steps that the whole process must be finished in 60 days from the initial filing unless a longer period is approved by the Commissioner of Personnel [F.501].

2. the method or methods of hearing panel selection - As indicated previously, there are several methods of hearing panel selection, and Hearing Officers may be used as an alternative or a supplement to the Panel [see notes

to F.204]. Whatever method you select must be described in the procedure.

3. organization and duties of the panel - Spell out how they will get started and exactly what they are to do. Panel members and Hearing Officers should understand clearly that they are not empowered to hear and cure the sins of the world. Rather, they are empaneled to hear a specific grievance and make reasonable recommendations to the appointing authority.

#### Attachment

#### Grievable Cause as Defined in Par. F.103

1. unfair treatment
2. unsafe working conditions.
3. unhealthful working conditions.
4. erroneous interpretation of Agency policies.
5. erroneous application of Agency policies.
6. erroneous interpretation of the Rules and Regulations.
7. erroneous application of the Rules and Regulations.
8. capricious interpretation of Agency policies.



9. capricious application of Agency policies.
10. capricious interpretation of the Rules and Regulations.
11. capricious application of the Rules and Regulations.
12. unlawful discrimination because of race.
13. unlawful discrimination because of color.
14. unlawful discrimination because of sex.
15. unlawful discrimination because of national origin.
16. unlawful discrimination because of handicap.
17. unlawful discrimination because of age.
18. unlawful discrimination because of religious opinions.
19. unlawful discrimination because of religious affiliations.
20. unlawful discrimination because of political opinions.
21. unlawful discrimination because of political affiliations.

## APPENDIX K

SUMMARY OF BASIC RIGHTS, EXPRESSED AND IMPLIED BY LAW THAT PARTITIONER FEELS VIOLATED AND EXTRACTED FROM PETITIONER'S OPENING BRIEF TO THE 11TH CIRCUIT. ALL REFERENCES TO EXHIBITS ARE REFERENCES TO EXHIBITS CONTAINED IN THE OPENING BRIEF: (BIRTH CERTIFICATE AT APPENDIX L.)

\* the right not to be discriminated against in any employment practice on the basis of race, color, sex, age, because of desperate treatment and desperate impact. See Griggs v. Duke Power Co., 401 U.S. 424 (1971) and McDonnell Douglas v. Green, 411 U.S. 792 (1973);

\* the right that the guarantees of equal protection cannot mean one thing when applied to one individual and something else when applied to another. It is also noted in Bakke that the 14th Amendment is extended to "persons". See University of CA Regents v. Bakke, 438 U.S. 256 (1978);

\* the right prima facie rules. See McDon-

nell Douglas.

\* the right not to be relegated to a watered-down version of constitutional rights. See Tygrett v. Washington, D.C., Cir. No. 1392-72, (1974);

\* the right to fair treatment, fair application of rules and regulations, and fair play by a governmental entity;

\* the right to be free from subjectively erroneous or capricious interpretation or application of the rules and regulations; See Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972) for subjective determinations.

\* the right to complete the working test period of six months (See Exs "L" and "V").

\* the right not to be abused by supervisors during a working test.

\* the right to be free of clearly unreasonable, arbitrary, or capricious action. See Estrban v. Central Mississippi State College, 415 F. 2d 1077 (1979);

\* the right that I be provided, under the Vitarelli doctrine, the greatest procedural protection under "any" possible regulatory standards. See Vitarelli v. Seaton, 359 U.S. 535 (1959):

\* the right that regulation's validity prescribed by a government administrator be binding upon him as well as the citizen; as this principle holds even when the administrative action under review is discretionary in nature. See Accardi v. Shaughnessy, 347 U.S. 260 (1954);

\* the right that an employment decision (including a decision not to employ) which adversely affects the employee not be discriminatory, arbitrary, or capricious;

\* the right not to have a dismissal rule retroactively applied (See defendants/appellees Brief);

\* the right that administrative convenience cannot validate arbitrary rules. See Cleveland Board of Education v. Laflaur, (414 U.S. 632, 1974)

# APPENDIX L

## RECORD OF BIRTH



STATE OF WEST VIRGINIA  
COUNTY OF MERCER, TO-WIT:

This certifies that the following Record of Birth is registered and preserved in the office of the Clerk of the County Commission of Mercer County, Princeton, West Virginia:

Name Roland Alexander Jones File No. 37-9-102  
Date of Birth March 29, 1937 Sex Male  
Place of Birth Bluefield, Mercer County, West Virginia  
Father: { Name St. Clair Jones Color or Race Colored  
Age at Time 26 Birthplace West Virginia  
This Birth  
Mother: { Name Hettie Smith Color or Race Colored  
Age at Time 22 Birthplace West Virginia  
This Birth  
Birth Register No. 9 Page 102 Date Filed April 8, 1937  
Given under my hand and seal of said Commission, at Princeton, this 30 day of May 1934

*Rudolph O. Jennings*, Clerk  
County Commission of Mercer County, West Virginia

*Oliver L. Williams*, Deputy

(ANY ALTERATIONS OR ERASURES VOID THIS CERTIFICATION)

**BEST AVAILABLE COPY**

NO. 83-2065<sup>(3)</sup>

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1984

Office - Supreme Court, U.S.

FILED

OCT 15 1984

ALEXANDER L. STEVAS  
CLERK

ROLAND A. JONES,  
Petitioner,

v.

THE STATE OF GEORGIA, DEPARTMENT  
OF HUMAN RESOURCES, et al.,  
Respondents,

BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

MICHAEL J. BOWERS  
ATTORNEY GENERAL

JAMES P. GOOGE, JR.  
EXECUTIVE ASSISTANT  
ATTORNEY GENERAL

MARION O. GORDON  
FIRST ASSISTANT  
ATTORNEY GENERAL

WAYNE P. YANCEY  
SENIOR ASSISTANT  
ATTORNEY GENERAL

Please serve:

WAYNE P. YANCEY  
Senior Assistant  
Attorney General  
132 State Judicial Building  
Atlanta, Georgia 30334  
(404) 656-3377

SUSAN L. RUTHERFORD  
STAFF ASSISTANT  
ATTORNEY GENERAL

BEST AVAILABLE COPY

30pp



NO. 83-2065

IN THE  
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Attorney General  
132 State Judicial Building  
Atlanta, Georgia 30334  
(404) 656-3377

SUSAN L. RUTHERFORD  
STAFF ASSISTANT  
ATTORNEY GENERAL



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NO. 83-2065

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ROLAND A. JONES,

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v.

THE STATE OF GEORGIA, DEPARTMENT  
OF HUMAN RESOURCES, et al.,

Respondents.

---

BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

I. Issue Presented

Whether the Eleventh Circuit Court of Appeals correctly affirmed the district court's dismissal of the Petitioner's complaint for lack of subject matter jurisdiction due to his failure to establish a property or liberty interest in his continued public employment.

The first part of the paper discusses the importance of the study.

### Methodology

The study was conducted using a qualitative approach.

### Results and Discussion

#### Findings

The results of the study are as follows:

1. The first finding is that the study was successful.

2. The second finding is that the study was successful.

3. The third finding is that the study was successful.

The study was conducted using a qualitative approach.

The results of the study are as follows:

1. The first finding is that the study was successful.

2. The second finding is that the study was successful.

3. The third finding is that the study was successful.

## II. Statement of the Case

Petitioner filed a civil rights action, pursuant to 42 U.S.C. § 1983, challenging his dismissal as a "working test" employee of Respondent Georgia Department of Human Resources. Respondents filed a Motion to Dismiss on the grounds that the Court lacked subject matter jurisdiction and the Complaint failed to state a claim upon which relief could be granted because Petitioner had failed to allege the deprivation of any federally protected interest. By an Order entered on the 11th day of March, 1983, by Judge Marvin Shoob, the United States Court, Northern District of Georgia, dismissed the action of Respondents' Motion.



Subsequently, Petitioner filed a Motion for Reconsideration of the Court's dismissal of his action. Respondents filed their brief respectfully requesting that that Motion be denied as the Petitioner had failed to allege any material evidence or legal error which would give cause to the Court to alter its previous judgment and asserting that it must therefore stand as entered.

By an Order dated April 21, 1983, in a decision by Judge Marvin Shoob, the United States District Court, Northern District of Georgia, denied Petitioner's Motion for Reconsideration of the grounds that Petitioner's failed to prove any new grounds to disturb the court's finding





that he had no property interest in his continued employment with the Respondent Georgia Department of Human Resources. Petitioner subsequently filed a Notice of Appeal with the Eleventh Circuit Court of Appeals on May 16, 1983. Petitioner alleged that it was improper for the Court to not recognize jurisdiction over his claim because of his failure to establish a property interest in continued employment. Petitioner asserted that the court should reach the merits because of the alleged discriminatory actions of the Respondents and that it was error to not do so based on the sole ground that he has not established a property interest. Petitioner further asserted that he has a liberty interest at stake which



the Court has failed to consider by its dismissal.

By a decision dated February 21, 1984, the Eleventh Circuit Court of Appeals, by unanimous decision, affirmed the district court's decision finding that a probationary public employee who had been dismissed during a six month "working test" had not been unconstitutionally deprived of any property or liberty interest which would justify seeking relief within a federal forum.

### III. Statement of the Facts

Petitioner has filed this civil rights action challenging his dismissal as a "working test" employee of Respondent Georgia Department of Human Resources. Under Rules 11.100 and 11.200 of the State Personnel



Board (Exhibit B-20 of Plaintiff/Petitioner's Complaint, R-128), State employees such as the Petitioner must satisfactorily complete a "working test" before being considered for "permanent status." A State employer is free to terminate the services of an employee at any time during the "working test" where the employee fails to perform satisfactorily, so long as the employee is notified in writing in advance of the date on which his services are to be terminated. See Personnel Board Rule 12.201.1) Exhibit B-21 of Complaint, R-132). See also O.C.G.A. § 45-20-2(16), (17); Ga. Code Ann. § 40-2202(a)(15), (16); Whittaker v. Department of Human Resources, 30 Fed. R. Serv. 2d 931 (N.D.Ga. 1980)



(copy attached to Defendants' Motion to Dismiss, R-198-200).

Petitioner alleges that he is a former employee of Respondent Georgia Department of Human Resources and that his termination during his "working test" was in contravention of certain rules and regulations of the State Personnel Board, which are attached as exhibits to his Complaint. Petitioner alleges that the failure of Respondents to retain his services at the end of his probationary period was the result of certain discriminatory motives rather than reflecting a routine personnel decision. Respondents state that their failure to retain the services of Petitioner was an ordinary exercise of an employer's discretion to not retain a





probationary employee on a permanent status. The decision to not retain Petitioner was a routine personnel decision and is not in conflict with any legal or constitutional standard.

#### IV. Argument

##### Summary of Argument

The United States District Court, Northern District of Georgia, dismissed Petitioner's action finding that it was beyond the limited jurisdiction of the court as the Petitioner had failed to allege any federally protected interest.

Petitioner has alleged that his termination was the result of the supposed violation of a number of rules of the State Personnel Board of Georgia but has nowhere alleged the deprivation of any rights sufficient



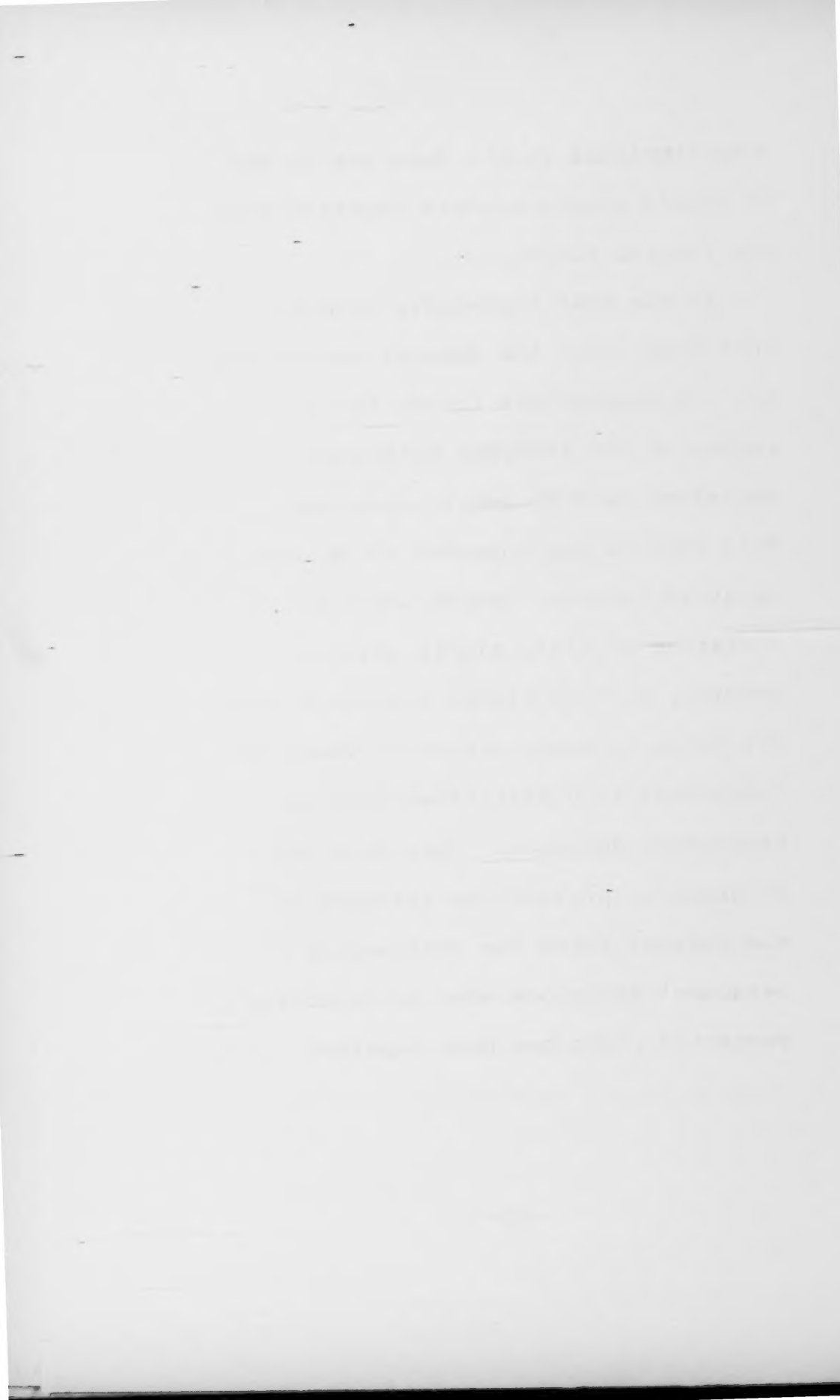
to secure federal judicial review.

In order to secure review in the federal forum, Petitioner must sufficiently allege that he has a "liberty" of a "property" interest in his continued public employment which would warrant constitutional protection. The determination of whether such an interest exists is dependent upon the state law. Although Petitioner has alleged the violation of various rules and regulations of the State Personnel Board in his dismissal, Petitioner has failed to state a claim which falls within the limited subject matter jurisdiction of the federal courts. Even if the Respondents did apply the wrong regulation, a mistaken personnel decision not implicating federal



constitutional rights does not in and of itself create a claim cognizable in the federal forum.

It has been repeatedly held by this Court that the federal courts are not the appropriate forums for a review of the everyday personnel decisions made by public agencies. This rule is not intended to be used to avoid judicial review where a violation of civil rights exists; however, a civil rights violation does not exist in every situation where an individual is dissatisfied with an employment decision. This rule was intended to prevent the reliance on the federal forum for challenging personnel decisions when no federally protected right has been deprived.





This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

A.

THE DISMISSAL OF APPELLANT'S ACTION FOR LACK OF SUBJECT MATTER JURISDICTION WAS PROPER GIVEN APPELLANT'S FAILURE TO ASSERT A PROPERTY INTEREST IN CONTINUED PUBLIC EMPLOYMENT.

The fact that the Rules and Regulations of the State Personnel Board might provide for certain procedures for terminating a "working test" employee does not mean that Petitioner has a federally protected interest in assuring that State officials comply with the Board's guidelines. A federal forum is not an appropriate forum for reviewing



everyday personnel decisions of public agencies, even if they are ill-advised, if no constitutionally protected interest is at stake.

The United States District Court, Northern District of Georgia, dismissed this action recognizing that it would only have jurisdiction over Petitioner's claim, that Respondents violated the Rules and Regulations of the State Personnel Board in dismissing him, only if he had a "liberty" or "property" interest in his continued public employment to warrant constitutional protection. Board of Regents of State Colleges v. Roth, 408 U.S. 571, 579 (1972). In reviewing the applicable State law, the district court held that there was nothing to confer a property right in



continued employment. Even assuming that Respondents violated the Rules and Regulations of the State Personnel Board in a dismissal of Petitioner, merely conditioning an employee's removal on compliance with certain procedures does not imply a right to continued employment. In reconsidering the issue of whether Petitioner has alleged deprivation of any rights sufficient to secure federal judicial review, no protected interest is apparent even by a liberal reading of Petitioner's various pleadings; in fact, Petitioner's brief does not contest the district court's finding that a property interest was not asserted but raises the issue of whether a court can fail to review the alleged discriminatory acts of the



Respondents merely because no property interest exists.

Petitioner's allegations that Respondents violated the Rules and Regulations of the State Personnel Board in dismissing him are entirely insufficient to secure jurisdiction in a federal forum. As this Court has ruled in Bishop v. Wood, 426 U.S. 341 (1976):

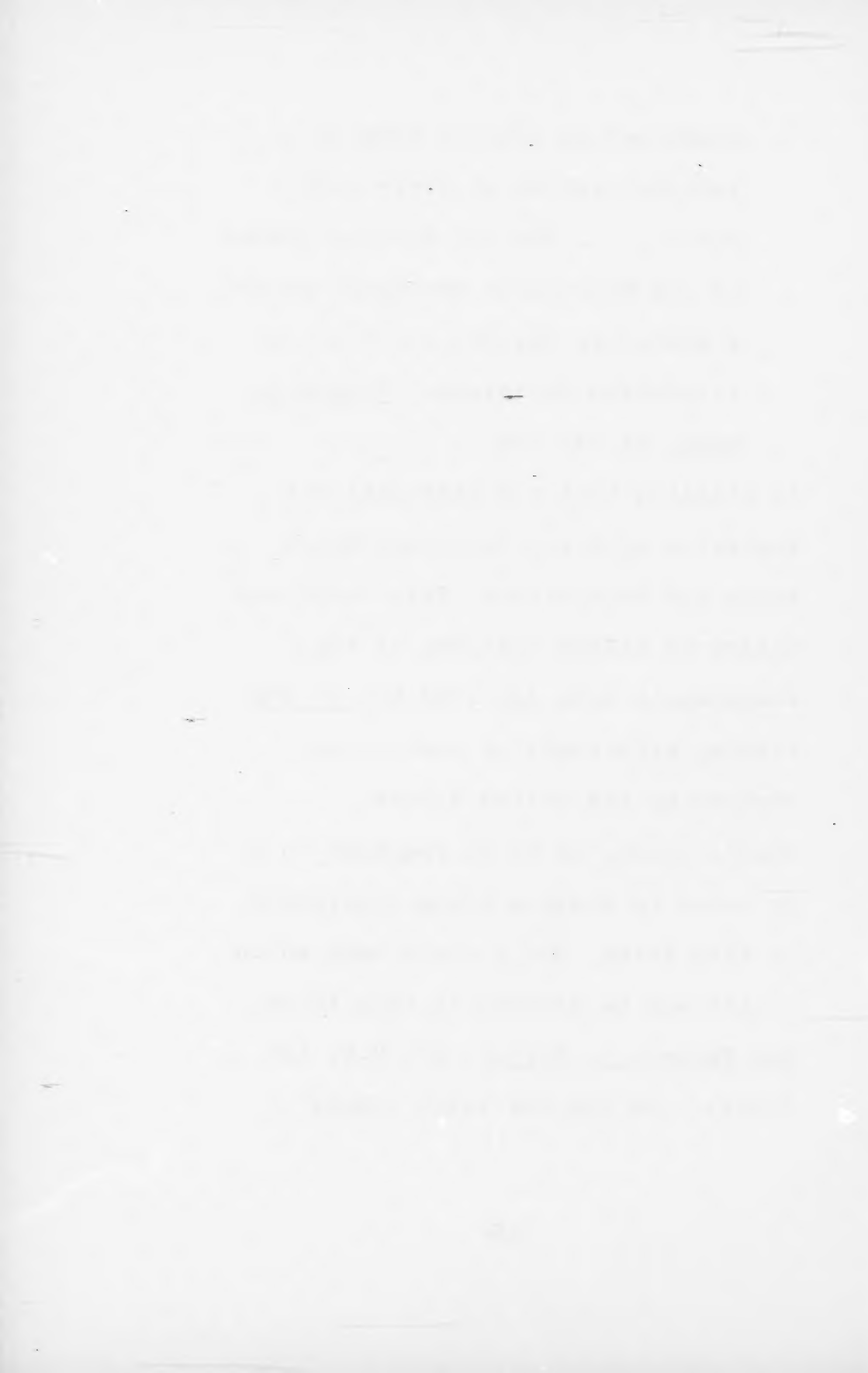
"The federal court is not the appropriate forum in which to review the multitude of personnel decision that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day to day administration of our affairs. The United States Constitution cannot feasibly be





construed to require federal judicial review of every such error . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or illadvised decisions." Bishop v. Wood, at 349-350.

In alleging that his dismissal was violative of State Personnel Board Rules and Regulations, Petitioner has failed to allege that any of the Respondents have deprived him of any rights, privileges or immunities secured by the United States Constitution, as he is required to do in order to state a claim cognizable in this forum, and a claim upon which relief may be granted in this forum. See Parratt v. Taylor, 451 U.S. 527 (1981). As the Complaint itself



reveals, Petitioner was a "working test" employee of Respondent Department of Human Resources at the time when he was terminated. As such, he had no property interest in continuing employment with the Department of Human Resources. See O.C.G.A. § 45-2-8(a); Ga. Code Ann. § 40-2207(a), which conditions dismissal of "permanent status" employees only, upon compliance with the Rules and Regulations of the State Personnel Board. As a matter of State law, a working test employee, on the other hand, may be dismissed by a State employer at any time during the working test, and has no right to seek relief pursuant to the appeal procedures in the Rules and Regulations of the State Personnel



Board. See Personnel Board Rule 12.300 (Exhibit B-21 of Plaintiff/Petitioner's Complaint, R-132).

It is thus clear as a matter of State law that the Petitioner, a working test employee, had no property interest in continuing employment with the Department of Human Resources, and thus, suffered no deprivation which might offend Petitioner's constitutional rights to due process. Furthermore, Respondents find no allegations sufficient to indicate that the termination of Petitioner by the Department of Human Resources implicates any other right, privilege or immunity secured by the united States Constitution.





Petitioner is correct in stating that the harsh fact of the Bishop v. Wood decision is not intended to be used to avoid judicial review where a violation of civil rights exists; however, Petitioner fails to note that a civil rights violation does not exist in every situation where an individual is dissatisfied with an employment decision and the rule of Bishop v. Wood was intended to prevent reliance on the federal forum for challenging personnel decisions when no federally protected right has been deprived. As recognized by the Eleventh Circuit Court, the claims of the Petitioner are foreclosed by the clear precedents of this Court.



B.

APPELLANT HAS FAILED TO ASSERT A  
LIBERTY INTEREST WHICH WOULD  
CONFER SUBJECT MATTER JURISDICTION  
ON A FEDERAL COURT AND THUS, THE  
DISMISSAL SHOULD BE AFFIRMED.

Petitioner has further asserted  
that the district court's dismissal  
for lack of subject matter  
jurisdiction was erroneous because the  
failure to retain him as a permanent  
status employee constituted a  
deprivation of a liberty interest.  
Petitioner alleges that the employment  
decision of Respondents has  
stigmatized Petitioner's reputation.

Petitioner has not alleged that  
the State has asserted any  
stigmatizing reason for his firing or  
otherwise acted in a manner which



would cause his good name or reputation to be jeopardized. Rather, Petitioner has merely asserted that the failure to have his employment continued is stigmatizing. Under the State law, as previously asserted, a State employer may terminate an employee such as the Petitioner at any time during the working test period. As held by the Court, this rule does not restrict the exercise of the employer's discretion to discharge a working test employee by any language such as for cause, which might imply a right to continued employment absent a finding of cause for the discharging reason. While the non-retention of an employee might make the employee somewhat less attractive to other employers, it has been recognized by



the United States Court that it would stretch the concept of due process too far:

"to suggest that a person is deprived of 'liberty' when he is simply not rehired in one job but remains as free as before to seek another." Board of Regents v. Roth, supra at 575.

When a public employee is not retained after completing a probationary period and his position is terminable at the will of the employer, he is not deprived of a constitutionally protected right when there is no disclosure of the reasons



THE UNIVERSITY OF CHICAGO

THE DIVISION OF THE PHYSICAL SCIENCES

DEPARTMENT OF CHEMISTRY

RECEIVED

APRIL 10, 1954

FROM

DR. J. H. DILLON

CHICAGO, ILL.

TO

DR. J. H. DILLON

CHICAGO, ILL.

RE: [illegible]

[illegible]

[illegible]

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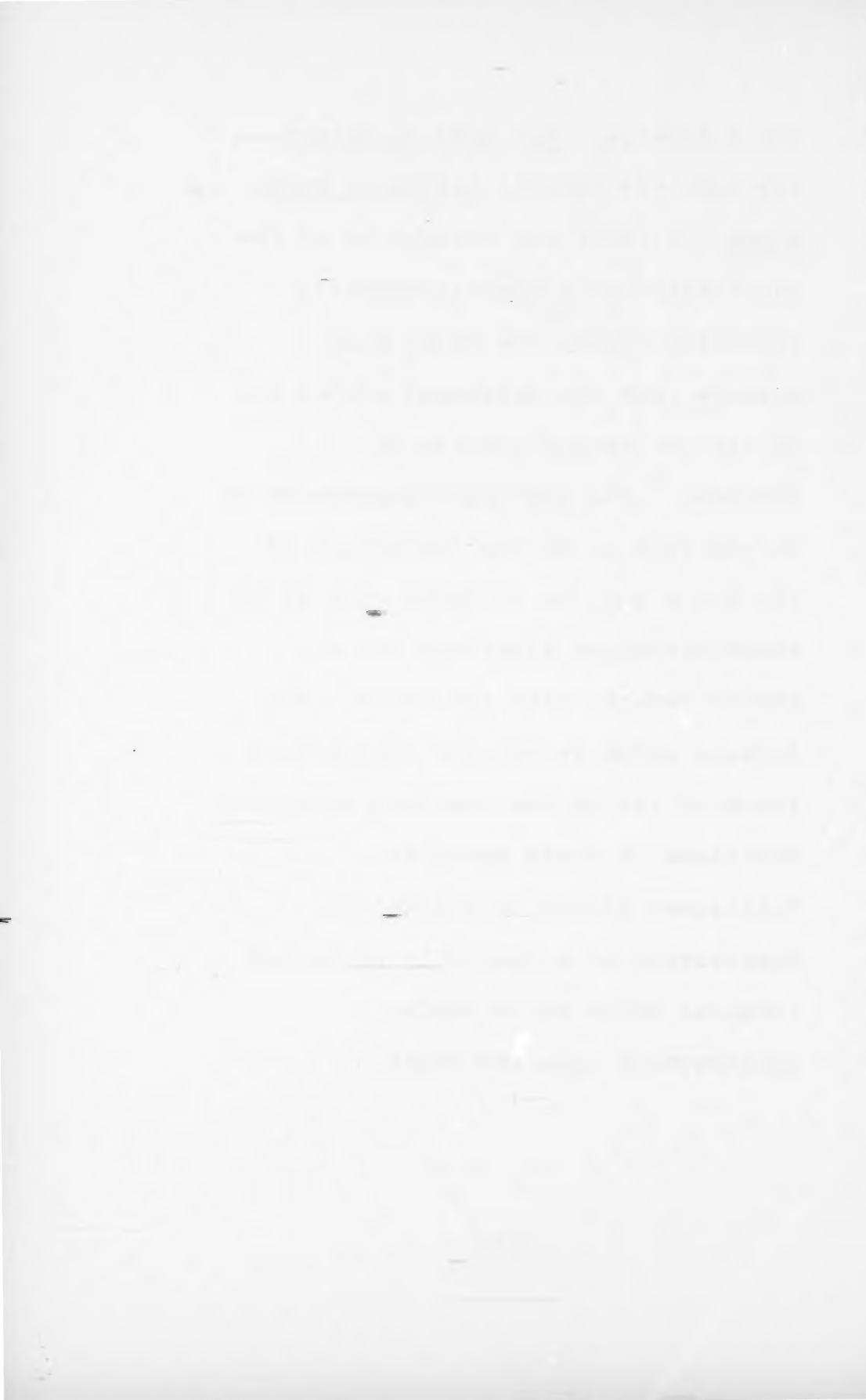
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for discharge. See Codd v. Belger,  
429 U.S. 624 (1977); Bishop v. Wood,  
supra. Without the allegation of the  
deprivation of a constitutionally  
protected right, the Court must  
presume that the personnel action was  
within the regular course of  
business. The continued employment of  
an employee is at the discretion of  
the State and the ultimate control of  
State personnel relations is, and  
should remain, with the State. The  
federal forum is not the appropriate  
forum to review the everyday personnel  
decisions of State agencies.  
Petitioner failed to allege the  
deprivation of a federally protected  
interest which would confer  
jurisdiction upon the Court.



#### IV. Conclusion

Petitioner has failed to allege that he has been deprived of any federally protected interest or otherwise allege the deprivation of any rights sufficient to secure federal judicial review. Rather, Petitioner has based his claim on his own personal dissatisfaction with the personnel decision of the Respondents to not continue his employment.

The ultimate control of State personnel relations should remain with the State and it should be at the discretion of the State to continue employment of an employee. Without the allegation of a deprivation of a property or liberty interest, the Court must presume that the personnel



decision was regular and even if  
ill-advised, best corrected by means  
other than a resort to a federal forum.

For the reasons cited herein,  
Respondents respectfully request that  
the decision below be affirmed as  
Petitioner has failed to allege any  
property or liberty interest which  
would confer subject matter  
jurisdiction upon the federal courts.

Respectfully  
submitted,

MICHAEL J. BOWERS  
Attorney General

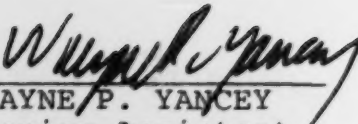
JAMES P. GOOGE, JR.  
Executive Assistant  
Attorney General


*Marion O. Gordon by APY*  
MARION O. GORDON  
First Assistant  
Attorney General

(Signatures continued  
on next page)





  
WAYNE P. YANCEY  
Senior Assistant  
Attorney General

  
SUSAN L. RUTHERFORD  
Staff Assistant  
Attorney General

Please serve:

WAYNE P. YANCEY  
Senior Assistant Attorney General  
132 State Judicial Building  
40 Capitol Square, S.W.  
Atlanta, Georgia 30334  
(404) 656-3391

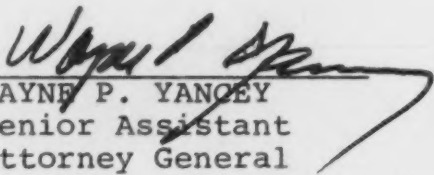


CERTIFICATE OF SERVICE

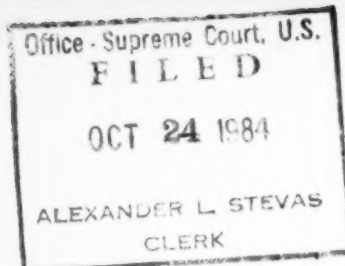
I do hereby certify that I have  
this day served the within and  
foregoing BRIEF, prior to filing the  
same, by depositing a copy thereof,  
postage prepaid, in the United States  
Mail, properly addressed to the  
following:

Mr. Roland A. Jones  
1390 Heatherland Drive  
Atlanta, Georgia 30331

This 12<sup>th</sup> day of October, 1984.

  
WAYNE P. YANCEY  
Senior Assistant  
Attorney General

5  
No. 83-2065



IN THE  
  
SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1983

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ROLAND A. JONES,

PETITIONER,

v.

DEPARTMENT OF HUMAN RESOURCES (DHR),  
STATE OF GEORGIA, et al.,

RESPONDENTS.

---

---

PETITIONER'S SUPPLEMENTAL  
BRIEF TO REPLY TO BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

---

ROLAND A. JONES, PRO SE  
LT. COL. U. S. ARMY (RETIRED)  
1390 HEATHERLAND DR.  
ATLANTA, GA 30331  
(404) 344-1332

48 Pp

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<u>Pinkard v. Pullman-Standard,</u> <u>a Div. of Pullman, Inc.,</u> 678 F.2d 1211 (11th 1982)...	8,p1 encl1
<u>Pitter v. Goodwill Industries,</u> 518 F.2d 864 (6th).....	10,p2,3 encl1
<u>Rowe v. General Motors Corp.,</u> 457 F.2d 348, 359 (5th 1972)..	p6,encl1
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42 U.S.C.A. 2000e et seq.,	
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No. 83-2065

IN THE  
SUPREME COURT OF THE UNITED STATES  
TERM: OCTOBER 1983

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ROLAND A. JONES,  
v.  
DEPARTMENT OF HUMAN RESOURCES (DHR),  
STATE OF GEORGIA, et al.,  
RESPONDENTS.

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PETITIONER'S SUPPLEMENTAL  
BRIEF TO REPLY TO BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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AUTHORITY FOR SUBMISSION

Rule 22.6 provides that any party may  
file a supplemental brief at any time  
calling attention other intervening matter.

Information on Georgia law and Merit  
System Rules, withheld by respondents, is  
hereby provided by Petitioner herein.

SUMMARY OF PREVIOUS DISPOSITIONS

Not including the rights and privi-

leges denied appellant by DHR, the record reveals that I submitted to the courts:

Substantive request for  
action/consideration.....34

Administrative request.....3

Total..... 37

Of the 37 requests/motions submitted to District and the Appeals Courts, approvals and disapprovals were as follows:

Substantive request for  
action/consideration denied....33

Administrative request  
approved.....3

De novo review request,  
no response-ignored by 11 Cir...1

All of respondents 2 motions for the misapplication of precedents of Bishop and Roth were GRANTED. See RECORD OF REQUEST DENIALS at the Court of Appeals at Appen A.

#### SUMMARY OF TERMINATION FACTS

The action was brought pursuant to respondents use of practices and procedures that were made unlawful under U. S. Supreme Court decisions, decisions in the 11th Cir., and decisions against the

DHR in this circuit (e.g. Whittaker and Kennedy); respondents entered an agreement of an ensuing and continuing "pattern" of disparate treatment and "discrimination" covering a four (4) month, 23 day period of a six (6) month work test. Supervisors retaliated by means of termination before the work test was completed. Respondents designed this method of "retaliation" to foreclose on Petitioner's job opportunities and freedom of expression within the DHR. Respondents terminated Petitioner because of my opposition to discriminatory practices and procedures used by the supervisors.

I wish to bring to the attention of the Court an extremely odd pattern of circumstances and discharges which were directly or indirectly orchestrated by supervisors as they pertain to black males and the Planning and Evaluation Unit, Division of Family and Children Services, Department of Human Resources:

1. Upon appointment, to a classified covered position as a Planner, I was assigned an inordinate volume of work and a multitude of varied work assignments not related to the job that I was hired for. Some of the duties included office messenger boy, moving office furniture (was in a all female unit), and being assigned the filing work assignments of an incompetent white female employee in the unit. Other white females in the unit were allowed to specialize on one work project. I was assigned, and I completed it, the work assignment of another female that had rested uncompleted for over two years.

2. Being the newest member of the unit and a work test employee, without any seniority over the other members of the unit, I was assigned the supervisory responsibilities of the unit supervisor when my supervisor was away on leave, sick leave, or away in school.



3. Contrary to three different rules (See the Working Test Rule, encl. 2, herein and, items 8, 9, 10, page 70 Record of Appendices), the supervisors would not credit me for all of my time on the job which started on May 18, and not on June 1.

4. I was criticized, and later fired, for asking defendants to correct my record based on the above rules.

5. Although qualified (See Appendix H, Record of Appendices), available, and on location, I was not given the opportunity to compete for the in-house position as the Director of the Management Information Office. A white male was hired from outside of the DHR and the State Merit System.

6. Although I was better qualified, holding a Merit System classification rating higher than a Training Coordinator, I was not given the opportunity for the in-house position of Training Coordi-

nator. A white female was hired from outside of the DHR and the Merit System.

7. Just before my arrival, a senior black male who was functioning in a planning and evaluation unit was transferred out of the unit and defendant female was hired from another division in DHR and assigned as the CHIEF of the unit. The black male subsequently resigned his position.

8. Another black male on temporary duty with the unit, known as Abdul, was also fired during the time that I was assigned to the unit.

9. I voiced my dissatisfaction concerning 1-6, above, and was fired before the work test was completed. (See Judge Godbold Cmt., p 7, my Reply, yellow cov.).

10. I acted in a manner reasonable under the circumstances.

11. The black Dep. Director (a retired Army Lt. Col.) resigned. Shortly after his resignation, I was fired.

12. With all black males removed, a temporary female replacement was hired to replace me. She was later replaced by a permanent hire making the unit 100% female.

13. As the result of an investigation by the Georgia Department of Labor, on January 22, 1983, I was provided a decision confirming the employment decision to fire me as arbitrary and capricious, because my firing was not because of a lacking in job performance:

"Information supplied by the employer does not specify any particular instances of claimant's failure to follow rules, orders, or instructions, the burden of proof being on the employer, and the presumption with claimant..."

#### PRESUMPTIONS

1. 42 U.S.C 1983 provides a private, federal remedy for persons deprived of federal rights under color of state law.

2. Title VII was made applicable to Merit Systems of State and local governments in 1972.

3. "A statute designed to remedy the national [State of Ga.] disgrace of discrimination in employment should be interpreted generously to comport with its primary purpose..." California Brewers Association v. Bryant, U. S. 63 L.Ed 2d 55 (1980).

4. Nontenured [probationary] librarian in a civil rights action showed that her constitutionally protected conduct under the First Amendment was a substantial or motivating factor in decision not to rehire her. The university had to demonstrate by a preponderance of the evidence that it would have reached the same decision as to employee's employment in the absence of such conduct. U.S.C.A. Const. Amend. 1, Montgomery v. Boshears, 698 F.2d 739 (11th Cir. 1983 Miss.), United Carolina Bank v. Board of Regents of Stephen F. Austin State University, 665 F.2d 553 (5th Cir. 1982 Tex.), White v. South Park Independent School Dist., 693 F.2d 1163 (11 Cir. 1982 Tex.), Pinkard v. Pullman-Standard, a Div. of Pullman, Inc., 678 F.2d 1211 (11th Cir. 1982

Ala.), and Williams v. City of Valdosta,  
and 689 F.2d 964 (11th Cir. 1983) 42  
U.S.C.A. 1983.

5. It is reasonable to presume that a termination without relief pursuant to an appeal process creates an irrebuttable presumption.

6. It is reasonable to presume that during the hiring process, applicants for employment are protected; once permanent status is attained, and during the full term of employment thereafter, an employee is protected; thus, it is reasonable to presume that doing the short term of a working test (probationary) period an employee is also protected.

7. It is reasonable to presume that a greater burden than that approved by the U. S. Supreme Court has been required of me.

8. It is reasonable to presume that:

"pro se complaints are held to less stringent standards than formal proceedings drafted by lawyers" Hohman v. Hogan, 597 F.2d 490 (2d Cir.

1979).

9. It is reasonable to presume that:

"It cannot be said that government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."

10. The 5th Cir. (11th Cir) Court of Appeals has joined three other circuits in holding that the McDonnell Douglas formulation is applicable to discharge cases. (See Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th); Garrett v. Mobil Oil Corp., 531 F. 2d 892 (8th) and Pitter v. Goodwill Industries, 518 F.2d 864 (6th). Thus, the plaintiffs were required to show that 1) they are members of a protected minority; 2) they were qualified for the jobs from which they were discharged; 3) they were discharged; and 4) when they were discharged, their employer filled the positions with non-minority. Marks v. Prattco, Inc., 607 F.2d 1153 (5th Cir.). (See also Marshall v. Goodyear Tire and Rubber, 544 F. 2d

730, 1977, and Whiting v. Jackson State University, 22 FEP 1296, 1980).

11. It is reasonable to presume that the Merit System Rules and Regulations are a part of the "employment contract", binding on the employee. Conversely, to be legally sufficient these rules and regulations that are binding the employee are equally binding on the employer.

12. In Adams v. McDougal, 695 F. 2d 104 (1982), the term contract as used in the Civil Rights Act, refers to a right in the promisee against the promisor, with a correlative special duty in the promisor to the promisee of rendering the performance promised. (See also 42 U.S.C. 1981).

13. To be legally sufficient in the execution of a discharge, a Merit System employer who proclaims, throughout his rules and regulations, fair and equitable treatment and that his rules and regulations are in the spirit of Federal Laws,



is bound to follow and correct inequities caused by his supervisors in the use of his rules and regulations; a Merit System employer who also proclaims a dictate of "ethics" in his rules and regulations must prevent and control unethical actions of his supervisors.

14. It is reasonable to presume that discharges not conducted in accordance with the employers own laws and rules and regulation fall within the framework of federal laws governing the Merit Systems of State and local governments on the proposition that discrimination is illegal and due process requires an agency, as a minimum, must "comply" with its "own" Merit System Rules and Regulations.

15. Respondents also imply at pages 7 and 20 that under Georgia law and a Rule 12.301.1 discharge of a working test employee is backed by Georgia law and is at the discretion of supervisors, however:



"regulations validity prescribed by a government administrator are binding upon him as well as the citizen, and this principle holds even when the administrative action under review is discretionary in nature." Accardi v. Shaughnessy, 347 U.S. 260 (1954).

16. The attention of the Court is invited to other new conclusions of law that I deem relative to the questions in this case at enclosure, attached.

INVOLUNTARY SEPARATION RULE 12.301.1  
IS AN ARBITRARY RULE, NOT SUPPORTED  
BY GEORGIA LAW

The employer's right to run his business must be balanced against the right of the employee to express his grievances and promote his own welfare. Jefferies v. Harris County Community Action Association, 615 F. 2d 1025 (5th Cir. 1980).

An employee may demonstrate pretext for an impermissible discrimination action and that a discriminatory reason more likely motivated the employer and that the employer's explanation is unworthy of credence. Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. 2000e et seq.; Sweat

v. Miller Brewing Co., 708 F.2d 655 (11th Cir 1983).

The State law as offered by respondents is not correct, misleading, and it represents an insurmountable barrier. Under the insurmountable barrier test, a statutory scheme which makes a status an insurmountable obstacle to the vindication of rights or the receipt of benefits will constitute a denial of equal protection. (See Handley, by and Through Herron v. Schweikwer, 697 F. 2d 999 (11th Cir. 1983), and U.S.C.A. Const., Amend. 14.)

The Merit System Rules and Regulations must be grounded in the State Merit System Act, and stem from the Act to have the force and effect of law.

In the Purpose of the Merit System Rules and Regulations it is stated:

"The purpose of these rules is to implement and give effect to the provisions of Article IV, Section 6, Paragraph I of the State Constitution of 1976, and of the Merit System Act (Ga. Laws, 1975, p. 79, as amended)..."

According to Georgia Merit System law governing Merit System personnel, the rules and regulations are applicable to covered positions and working test employees who are covered by the rules and regulations because they occupy the covered positions; therefore, a right of appeal relief in accordance with the rules and regulations does, in fact, exist.

In addition to the rules and regulation covering working test employees provided this Court at Appendix "F", my Record of Appendices, the State of Ga, Merit System Act 81, 1975 states:

1. "(16) Working test employee' or employee on working test' means a covered employee serving in the class of a covered position ..."
2. "(11) Covered employee' means an employee subject to the rules and regulations of the Merit System."
3. "(10) Covered position' means a position subject to the rules and regulations of the State Merit System."
4. "(15) Working test' or working test period' means the initial period of employment in a class of covered position..."

GA. LAW, 1975, Section 7. Adverse Actions, Appeals and Hearings:

"NO (emphasis supplied) employee of any (emphasis supplied) department who is included under this Act or hereafter included under its authority and who is subject to the rules and regulations prescribed by the State Merit System MAY BE DISMISSED from said department or OTHERWISE ADVERSELY AFFECTED as to COMPENSATION OR EMPLOYMENT STATUS EXCEPT FOR GOOD CAUSE"

Respondents implied to both the District and Appeals Court that Section 45-20-2 (16) and (17), Ga. Code was their polestar Georgia law that they claimed permitted at will discharges; however, they did not present it to the U. S. Supreme court for scrutiny and evaluation.

Section 45-20-2(16) (17) of the Official Code of Georgia provides as follows:

"(16) "Working test" or "working test period" means the initial period of employment in a class of covered positions following appointment, re-appointment, or promotion. During this period, the employee is expected to demonstrate to the satisfaction of the appointing authority that he has the knowledge, ability, aptitude, and other necessary qualities to perform satisfactorily the duties of the position in which he has been

employed. The working test period will normally be the first six months in the class of positions; provided, however, that the commissioner may fix the length of the working test period for any class at not less than three months nor more than 12 months exclusive of time spent in nonpay status or in an uncovered position.

(17) "Working employee" or "employee on working test" means a covered employee serving a working test period in the class of covered positions in which he has been employed; provided, however, that an employee serving a working test period following a promotion from a lower class in which he held permanent status shall retain permanent status rights in the lower class until he attains permanent status in the class to which he has been promoted.

In Franks v. Bowman Transportation Co., Inc., 424 U. S. 747 (1976) it has been concluded that one of the central purposes of Title VII is to make persons whole, and that there is no legislative history to support making a distinction between employees employment rights by a mere classification as permanent or working test. The above Georgia laws make no distinction.

A State statute that is facially vague

is in violation of due process when the law is impermissibly vague in its applications. Facial vagueness occurs when a statute, such as the Georgia Law (O. C. G. A. 45-2-8 (a); Ga. Code Ann. 40-2207 (a)) implied by respondents to be an authority for terminations, is utterly devoid of a standard of conduct so that it simply has no core and it cannot be validly applied to any conduct. (High Ol' Times Inc. v. Busbee, 673 F. 2d 1225 (11th Cir. 1982)).

When statute or ordinance states that public employee can only be terminated for just cause, even a working test employee has property right of which he cannot be deprived without due process. Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982), and unequal application of a state law, fair on its face, may act as a denial of equal protection. U.S.C.A. Const. Amend. 5. Ziegler v. Jackson, 638 F.2d 776 (5th Cir. 1981).

Respondents imply at page 16 in their opposition to my petition that a working test employee, has no right to seek relief pursuant to their rules and regulations; a claim which is conditioned for "permanent status" employees only. This is misleading to this Court and is really irrelevant to the issues at bar.

However, respondents are correct by stating at page 16 that Ga Code Ann. 40-2207 conditions the dismissal of "permanent status employees" only; however, they state it in a context as if it applies to the dismissal of a "working test" employee; however, it stands as they have stated, it applies to dismissals of permanent status employees only.

Respondents are incorrect in stating at page 19 that I asserted the issue as a failure to retain me as a permanent status employee. The issue correctly stated: I was fired before I had the opportunity to reach the threshold



leading into permanent status, and permanent status, in the eyes of my supervisors, would have guaranteed me the right to file an appeal against them for their actions against me.

Being fired with less than 24 hour notice and before the working test was completed, was part of the over-all scheme of to prevent an appeal against the supervisors and to foreclose on sanctions against themselves, for the ill-actions against me.

A fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated to apprise parties of the pendency of the action and afford them an opportunity to present their claims. U.S.C.A. Const. Amend. 14, Matter of GAC Corp, 681 F.2d 1295 (11th Cir. 1982)

At no place in the Working Test Rule (encl 2) is it stated that a working test employee can be fired at will.



Conversely, it states that the working test period will be six months...no more and no less.

This Court is requested to note that one of the claims that I was fired for expressing (See Judge Godbold comment) that my working test period should have begun on May 18, when I actually (See Rule 11, encl 2, and page 69, items 8, 9, and 10, Record of Appendices) reported for work, and not June 1.

Civil rights statutes establish that when officers act under color of state law their conduct deprives a claimant of constitutionally protected interest. Howell v. Tanner, 650 F.2d 610 (5th, Ga. 1981).

Regulation F, paragraph F. 104 list those classes of employees not eligible to file a grievance as. A working test employee is not listed:

"At the discretion of the appointing authority or department head, the following employees may be excluded from eligibility to file a grievance:

"Employees on temporary, intermittent,

student, emergency, or other non-status appointment."

"Part-time employees who work 20 hours or less per week."

"Employees who have been notified of termination."

"Employees who are seeking relief or remedy for the grievance through other administrative or judicial process."

Respondents have retroactively applied in the court system the infamous Involuntary Separation Rule 12.301.1 in an attempt to continue to foreclose on my rights. I was dismissed under Rule 11.202.A (See Ex. "E.5", my Petition for Rehearing, 11th Cir., on file with the Clerk, U. S. Supreme Court.

However, even if the infamous Involuntary Separation Rule 12.301.1 is allowed to stand, the right to appeal is still not at the "discretion" of supervisors, the Merit System, the Governor, or the State Attorney General because the infamous Rule 12.301.1 states:

"...the separation cannot be appealed except as otherwise provided in these rules".

The Merit System Policy statement concerning grievances states:

1. "Access to the Grievance Procedure is a Right of employee, not just a privilege."
2. "Refusal to allow employee a reasonable time to process a grievance is appealable."
3. "Refusal to hear a legitimate grievance is an appealable offense."
4. "Any of the items listed as non-grievable become grievable if discrimination is charged or unjust coercion and reprisal is charged."
5. "Any disciplinary action, even if reasonable and justified, is grievable..."
6. "Don't try to stop grievances...either directly or through others."

And, the rules provide (See Ex. "M" and "P" through "T", Appellant's Reply 11th Cir., dated October 4, 1983, and page 77-84, Record of Appendices).

The action against me is clearly not a suspension and it is only Rule 12.502.1 (Suspensions) that states:

"...[a working test employee] the suspension cannot be appealed."

Facially neutral practice in the use of the rules and regulations and Georgia

law for their treatment of different groups, in fact, fall more harshly on one group than another and cannot be justified. Lincoln v. Board of Regents of Uni Sys of Ga., 697 F.2d 928 (11th, 1983).

If a State law challenged on equal protection grounds threatens fundamental right or impacts upon suspect class, court must strictly scrutinize law and uphold it only if it is precisely tailored to further compelling government interest. U.S.C.A. Const. Amend. 14, Doe v. Plyer, 628 F.2d 448 (5th Cir. 1980).

#### CONCLUSION

The conclusion in my Reply to Respondents Opposition to my Writ of Certiorari is still valid. My dismissal from my employment and respondents explanations for my dismissal is not grounded in fact or law.

The Georgia Department of Labor has confirmed that the employer has stated:

"Information supplied by the employer

does not specify any particular instances of claimant's failure to follow rules, orders, or instructions, the burden of proof being on the employer, and the presumption with claimant..."

Therefore my dismissal was arbitrary and capricious, and was not based on the purpose of a work test...job performance as the result of training received.

Respondents have implied to this Court that they, under color of Georgia law, have the discretionary power to dismiss minority probationary employees at will and without hearings.

Rule 12.301.1 has no basis in Ga. law. And, Ga. law, governing Merit System employees, does not state that a minority work test employee can be dismissed at any time during the work test period.

Rule 12.301.1 proposed as the authority by respondents and retroactively applied by the District Court, circumvented my Rule 11.202.A dismissal status.

No place in the Constitution of the State of Ga., Ga. law, and the System Act, (Ga

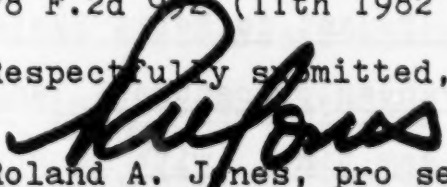
Laws 1975, page 79), in effect at the time of my employment does it state the claim that respondents are implying to this Court that a working test employee has no right to appeal or that a working test employee can be dismissed at anytime prior to completion of a working test.

Conversely, respondents polestar case used to justify my dismissal, in Webster the Court, citing Roth, noted that property interests are not created by the Constitution itself, but their dimensions are defined by existing rules or understandings that stem from an independent source such as State law. Webster v. Redmond, 599 F.2d 793 (5th Cir. 1979). The understanding clearly stems from State law that "working test employees" are, in fact, "covered" by the Merit System Rules and Regulations that permit relief pursuant to Merit System appeals and grievances procedures, and termination at any time, with no appeal rights

is prohibited; therefore, Rule 12.301.1 used by the District Court and affirmed by the Court of Appeals as grounds for dismissal (See page 8, Appen. "B", Record of Appendices), and the DHR Rule A.6.a that forecloses on grievances and appeals once I was notified (less than 24 Hrs) of termination, has no basis in law or fact.

It is reasonable to conclude that when, as is the fact in this case, respondents ~~IN DISTRICT COURT, APPEALS COURT, AND THIS COURT,~~ did not deny<sup>^</sup> the conditions specifically and with particularity, then my allegations are assumed admitted, and respondents cannot later assert that condition precedent has not been met. Fed Civ Proc Rules 9(c), 12(h)(3), 28 USCA; Civil Rights Act 1964, 706, 706(d,e,f) as amended 42 USCA. 2000-e5, 2000e-5(e), (f)(1,3). Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992 (11th 1982 Ga.).

Respectfully submitted,

  
Roland A. Jones, pro se  
Lt. Col. U. S. Army (Retired)



NEW CURRENT DISPOSITIONS  
OF CONCLUSIONS OF LAW  
APPLICABLE TO MY CASE

1 A court cannot sustain a federal court's dismissal unless it appears beyond a doubt that Petitioner could prove no set of facts in support of a claim that would entitle his relief. (See Federal Rules Civ. Proc. 12(b) (6), 28 U. S. C. A., Carpenters Local Union No. 1846 of United Broth. of Carpenters and Joiners of America AFL-CIO v. Pratt-Farnsworth, Inc., 690 F. 2d 489 (11th Cir. 1982), and Dumas v. Town of Mt. Vernon, 612 F. 2d 974 (5th Cir. 1980)).

1.1. Nontenured [probationary] librarian in a civil rights action showed that her constitutionally protected conduct under the First Amendment was a substantial or motivating factor in decision not to rehire her. The university had to demonstrate by a preponderance of the evidence that it would have reached the same decision as to employee's reemployment in the absence of such conduct. U.S.C.A. Const. Amend. 1, Montgomery v. Boshears, 698 F.2d 739 (11th Cir. 1983 Miss.), United Carolina Bank v. Board of Regents of Stephen F. Austin State University, 665 F.2d 553 (5th Cir. 1982 Tex.), White v. South Park Independent School Dist., 693 F.2d 1163 (11 Cir. 1982 Tex.), Pinkard v. Pullman-Standard, a Div. of Pullman, Inc., 678 F.2d 1211 (11th Cir. 1982 Ala.), and Williams v. City of Valdosta, and 689 F.2d 964 (11th Cir. 1983) 42 U.S.C.A. 1983.

2. The 5th Cir. (11th Cir) Court of Appeals has joined three other circuits in holding that the McDonnell Douglas formulation is applicable to discharge cases. (See Flowers v. Crouch-Walker Corp., 552 F.2d 1277 (7th); Garrett v.



Mobil Oil Corp, 531 F. 2d 892 (8th) and Pitter v. Goodwill Industries, 518 F.2d 864 (6th). Thus, the plaintiffs were required to show that 1) they are members of a protected minority; 2) they were qualified for the jobs from which they were discharged; 3) they were discharged; and 4) when they were discharged, their employer filled the positions with non-minority. Marks v. Prattco, Inc., 607 F.2d 1153 (5th Cir.). (See also Marshall v. Goodyear Tire and Rubber, 544 F. 2d 730, 1977, and Whiting v. Jackson State University, 22 FEP 1296, 1980).

2.2 Word of mouth recruitment, although neutral on its face, operates as a "built-in-headwind" for me, as a black. U.S. v. Georgia Power Co., 474 F2d 906 (5th Cir. 1973).

3. In the 5th and 8th Circuits, it is observed that statistics alone were sufficient to prove a prima facie case of discrimination. Afro American Patrolmen's League v. Duck, 503 F.2d 294 (5th Cir 1974).

4. Under disparate impact theory, petitioner need only show discrete, facially neutral practices which would have a more severe impact on protected group than on unprotected group Civil Rights Act of 1964, 701 et seq., 703(a)(2), 42 U.S.C.A. 2000e et seq., 2000e-2(a)(2) Carpenter v. Stephen F. Austin State University, 706 F.2d 608 (11th Cir 1983).

5. To establish a prima facie case, Petitioner need only show that facially neutral employment standards operated more harshly on one group than another. Civil Rights Act of 1964, 701 et seq., 703(a)(2), 42 U.S.C.A. 2000e et seq., 2000e-2(a)(2) Carpenter v. Stephen F. Austin State University, 706 F.2d 608

(11th Cir. 1983).

5.5 In a prima facie case of disparate treatment, then burden of production, not persuasion, shifts to defendant to articulate some legitimate, non-discriminatory reason for its actions. Jackson v. Seaboard Coast Line R. Co., 678 F.2d 992 (11th Cir. 1982 Ga.).

6. The four elements of the McDonnell Douglas are not the only way of proving a prima facie case of discrimination in employment. Civil Rights Act of 1964, 701 et seq., 2000e-5. Jones v. Western Geophysical Co. of America, 669 F.2d 280 (5th Cir. 1982 Tex.).

7. Circumstantial or statistical evidence impact may be so strong that the results permit no other inference but that they are the product of discriminatory intent or purpose. Smith v. Balkcom, 671 F.2d 858 (11th Cir. 1982 Ga.).

8. In a Section 1983 prima facie showing, two elements need only be shown: 1. that the act or omission deprived Petitioner of a right, privilege or immunity secured by the Constitution or laws of the United States, and 2. that the act or omission was done by a person acting under color of law. 42 U.S.C.A. 1983. Dollar v. Haralson County, Georgia, 704 F.2d 1540 (11 Cir. 1983).

9. To establish prima facie case of retaliation for participating in process of vindicating civil rights, Petitioner need only show an adverse employment action, and a causal link between protected actions and adverse employment decision; burden then shifts to defendant to articulate some legitimate, nondiscriminatory reason for adverse decision. Hamm v. Members of Board of Regents of

State of Florida, 708 F.2d 647 (11th Cir. 1983), and only a causal connection between actions and alleged constitutional violation is required. Barksdale v. King, 699 F.2d 744 (11th Cir. 1983 La.).

10. The District Court did not apply the proper burden of proof in its dismissal; the District Court failed to follow the proper burden of proof and evidence of pretext for discharge; the District Court did not address the relevant evidence of pretext as an indispensable element of the plaintiff's case. Corley v. Jackson Police Department, 566 F.2d 994 (5th Cir. 1978).

11. Once a prima facie case is made, burden is shifted to defendants to articulate legitimate, nondiscriminatory reason for their actions. Respondents have never articulated such reasons, nor have they been required to articulate such reasons by a court. Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. 2000e et seq. Smith v. State of Georgia, 684 F.2d 729 (11th Cir. 1982 Ga.).

12. Dismissal of a civil rights suit, alleging discrimination in employment practices, is appropriate when plaintiff has not made a prima facie case. Civil Rights Act of 1964, 701 et seq., 42 U.S.C.A. 2000e et seq.; Federal Rules Civ. Proc. Rule 41(b), 28 U.S.C.A., Junior v. Texaco, Inc., 688 F.2d 377 (11th Cir. 1982 Tex.).

13. Every accused person and every civil litigant is entitled to trial in a system that is fair. U.S.C.A. Const. Amends. 5, 14. Brown v. Vance, 637 F.2d 272 (5th Cir. 1981 Miss.)

14. Even absent the threat of future discriminatory behavior, courts have a

duty to correct and eliminate the present effects of past discrimination NAACP v. City of Evergreen, Alabama, 693 F.2d 1367 (11th Cir. 1982).

15. Under Title VII discharged plaintiffs because of their opposition to defendant's discriminatory practices are illegal. Corley v. Jackson Police Department, 566 F.2d 994 (5th Cir. 1978).

16. Subjectiveness invalidated has these characteristics:

(1) "[t]he foreman's recommendation is the indispensable single most important factor in the promotion process, [but he is] given no written instructions pertaining to the qualifications necessary for promotion;" (2) "those standards which were determined to be controlling are vague and subjective;" (3) "[h]ourly employees are not notified of promotion opportunities nor are they notified of the qualifications necessary to get jobs;" and, (4) "there are no safeguards in the procedure designed to avert discriminatory practices." Rowe, 457 F.2d 348, 358-59. Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972).

17. Management performance appraisals, experience forms and interviews provide a "mechanism for subjective actions; systems utilizing subjective evaluations by white supervisors provide a ready mechanism for discrimination. Fisher v. Procter & Gamble Mfg. Co., 613 F.2d 527 (5th Cir. 1980).

18. To be "prevailing party," in civil rights action, it is not necessary to prevail on each and every claim asserted or to receive all relief requested. 42 U.S.C.A. 1988. Civil Rights Act of

1964, 701 et seq., 706(k) as amended 42 U.S.C.A. 2000e et seq., 2000e-5(k); 42 U.S.C.A. 1988. Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982 Ga.).

19. Reinstatement is basic element of appropriate remedy in wrongful employee discharge cases. 42 U.S.C.A. 1983; U.S.C.A. Const. Amend. 1. Allen v. Autauga County Board of Education, 685 F.2d 1302 (11th Cir. 1982 Ala.)

20. 42 U.S.C. 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

21. 42 U.S.C. 1981:

"all persons...shall have the same right in every State...to the full and equal benefit of all laws...as is enjoyed by white citizens...."

22. 42 U.S.C. 1983:

42 U.S.C. 1983 provides a private, federal remedy for persons deprived of federal rights under color of state law. By its terms alone, 1983 imposes liability upon every person and prohibits a deprivation of "any" rights and privileges, not only secured by the Constitution, but also "laws".

"every person" who, under color of state law or custom "subjects or



causes to be subjected, any citizen of the United States...to deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

23. 42 U.S.C. 1985 (3):

"If two or more persons in any State or Territory conspire or go in disguises on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy,..."

24. 42 U.S.C. 1988:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity

with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

25. Title VII, 42 U.S.C. S 2000e-2(a), made applicable to state and local governments on March 24, 1972 provides as follows:

"(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to

deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

26. 42 U.S.C. 2000e:

42 U.S.C. 2000e, subsections (a) and (b), provide as follows:

#For the purposes of this subchapter-

"(a) The term person' includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such terms does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."



27. THE FOURTEENTH AMENDMENT:

The Fourteenth Amendment, Section 1, to the United States Constitution provides as follows:

"...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws" (emphasis supplied).

28. Ga. Code Ann. 3-704:

"All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within 20 years after the right of action shall have accrued; Provided, however, that all suits for the recovery of wages, overtime or damages and penalties accruing under laws respecting the payment of wages and overtime, prior to March 20, 1943, shall be brought within two years from such date; and that all such suits for the recovery of wages, overtime or damages and penalties accruing under laws respecting the payment of wages and overtime subsequent to March 20, 1943, shall be brought within two years after the right of action shall have accrued."

"Since there is not specifically stated or otherwise relevant federal statute of limitations for a cause of action under S 1981, the controlling period would ordinarily be the appropriate one provided by state law." Johnson v. Railway Express Agency, Inc., 421 U.S. 451, 95 S.Ct. 1716, 44 L.Ed.2d 295 at 302 (1975).

STATE PERSONNEL BOARD RULES & REGULATIONS

Page 37      June 1, 1976

RULE 11. WORKING TEST AND PERMANENT STATUS

SECTION 11.100. WORKING TEST

PAR.11.101. The working test shall be an essential part of the examination process, and shall apply to reappointment, regular appointment, unskilled and custodial appointment and to promotion.

PAR.11.102. The Board may fix the length of the working test period for any class at not less than three nor more than twelve months, exclusive of time spent in non-pay status. THE WORKING TEST PERIOD WILL BE the first SIX MONTHS IN A POSITION unless the Board designates a different length. Any change in the length of the working test period shall apply to all positions in the class affected, but if the period is increased in duration, employees employed under the shorter period will acquire permanent status as if the length had not been increased, unless otherwise specified by the Board.

PAR.11.103. THE WORKING TEST PERIOD SHALL BEGIN with the FIRST DAY on which the employee ACTUALLY reports for work except in instances where the first day of the month is a regularly scheduled non-work day for the position. In such case, the working test period is considered to BEGIN ON THE FIRST DAY of the month, although the employee cannot be placed in pay status until the day he ACTUALLY REPORTS FOR WORK.

ENCL: 2

## SECTION 11.200. PERMANENT STATUS

PAR.11.201. It shall be the responsibility of the appointing authority to ascertain whether the services of each employee appointed for a working test period have or have not been satisfactory, and he shall notify the Director that the employee is or is not recommended to be retained in the service.

PAR.11.202. If it is determined that the services of an employee have been unsatisfactory:

A. For an employee serving in working test period as the result of appointment or reappointment as provided under Rule 9, the appointing authority shall notify the employee in writing IN ADVANCE OF THE DATE on which his services are to be terminated. [WRITTEN NOTICE WAS NOT DELIVERED TO ME UNTIL 3 DAYS AFTER THE TERMINATION].

B. For an employee serving a working test period as the result of a promotion under Section 10.100, the appointing authority shall place the employee in an equivalent position in a class to which the employee is eligible for transfer, or in a position in the lower class in which the employee last held permanent status or was eligible for transfer. If such a vacancy is not available, the provision of Section 12.800. Reduction in Force (layoff) shall apply.

PAR.11.203. Permanent status of an employee completing a working test period shall be effective at the beginning of the date following completion of the working test period provided the employee is in work status on that date. Per-

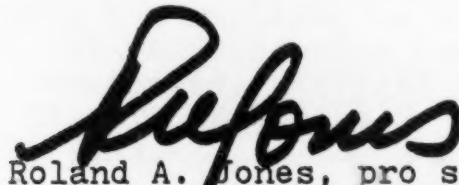
manent status shall not be granted to an employee appointed under the provision of Par.9.209 prior to the acquisition and submission to the appointing authority of the required license or certificate.

PAR.11.204. An employee who is not separated from his position prior to eligibility for permanent status shall acquire permanent status as provided in Par.11.203.

CERTIFICATE OF SERVICE

I, ROLAND A. JONES, do hereby certify that I have, this **22**nd day, of October 1984, served the foregoing prior to filing the same, by depositing 3 copies thereof, postage prepaid, in the United States Mail, properly addressed to the following to wit:

Mr. Wayne P. Yancy  
Ga. Department of Law  
132 State Judicial Building  
Atlanta, Ga. 30334



Roland A. Jones, pro se  
Lt. Col. U. S. Army (Retired)

No. 83-2065

IN THE

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1983

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ROLAND A. JONES,

PETITIONER,

v.

DEPARTMENT OF HUMAN RESOURCES (DHR),  
STATE OF GEORGIA, et al.,

RESPONDENTS.

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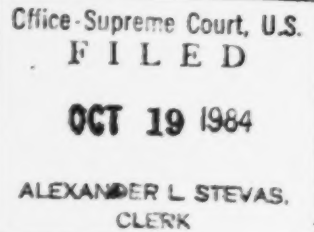
PETITIONER'S  
REPLY TO BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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ROLAND A. JONES, PRO SE  
LT. COL. U. S. ARMY (RETIRED)  
1390 HEATHERLAND DR.  
ATLANTA, GA 30331  
(404) 344-1332

2628



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(October 18, 1984)

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(404) 344-1332



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## ADMINISTRATIVE REASONS FOR DISALLOWING RESPONDENTS OPPOSITION

As is the fact in my case of respondents not following their own rules and regulation, respondents have not abided by the U. S. Supreme Court Rules. Respondents opposition must be disallowed for one or all of the following administrative reasons:

1. They have not made a timely filing within 30 days after receipt of my petition (Rule 22.1).

2. They have not shown proof of timely filing with notarized statement setting forth the details of the mailing to the Court: the required statement that "to his knowledge the mailing took place on a particular date (Rule 28.2) was not included; therefore, it is not timely filed for a second time, and not typed "pica" style (Rule 33.1 (c)). .

3. Both of respondent arguments (A and B) are stated as arguments for dis-

missal of my petition. Rule 22.3 plainly states that no such dismissal requests will be received by the Court. It must be dismissed as not having merit per Rule 33.7, but retained as a reference for the points herein.

LEGAL REASONS FOR DISALLOWING  
RESPONDENTS OPPOSITION

The respondents Brief in Opposition is vaguely asserted and based on an ill-defined, abstract notion (See Wieman, page 12, herein) and rationale to distract attention away from a pattern of internal discrimination within the Department of Human Resources (See Whittaker v. Department of Human Resources, Ex "I" and Kennedy v. Crittenden (DHR), page 10-14 and Ex "J", my 11th Circuit Petition for Rehearing, dated March 7, 1984, on file with the Clerk, U. S. Supreme Court) and for not providing relief.

The response is irrelevant because it does not address the questions placed



before this Court. They argue an abstract and irrelevant issue of Bishop v. Wood and property v. liberty when the issue of my petition is a "harsh fact" of discrimination, an unjustified and unwarranted termination, and my entitlement to the benefits of discrimination law:

1. Whether or not there was unfair discriminatory treatment because of race, and/or was there an ambiguous, arbitrary, capricious involuntary separation and grievance procedures in effect for me, as a black, that could be related to a pattern of being in effect for blacks throughout the Department of Human Resources (See page 10-14, Exs "B", "C", and "D", my 11th Circuit Petition for Rehearing, dated March 7, 1984, on file with the Clerk, U. S. Supreme Court?

2. Whether or not there was discriminatory interpretation and application of Georgia Law and/or Merit System policies and rules and regulations?

3. Whether or not there was capricious interpretation and application of Georgia Law and/or Merit System/DHR policies and rules and regulations?

4. Whether or not there was erroneous interpretation and application of Georgia Law and/or Merit System policies and rules and regulations?

5. Whether or not there was operating of the system for terminations was wholly subjective?

On page 6 of the Brief in Opposition the respondents cite Whittaker v. State of Georgia Dept. of Human Resources (DHR) as an authority for terminating working test employees; however, respondents failed to mention that the conclusions of law in Whittaker v. DHR points up a major flaw in their rationale for the abstract use of Bishop v. Wood as their polestar justification for working test employee dismissals; it is also major case in support of my claim that Bishop v. Wood

and its related property interest arguments are irrelevant, abstract, and foreign to the issues of discrimination before this Court; it also points up an issue of there being no uniformity in decisions concerning working test employees in the Northern District of Georgia; and it highlights the fact that there was a misapplication of precedents when the Northern District Court considered my case, as a working test employee, and did not apply the same factors of the working test employee case of Whittaker since the Whittaker case was against the same Georgia State DHR, and the case was in the same District Court system.

In Whittaker the Northern District of Georgia did not consider Bishop v. Wood and/or property/liberty interest. The District Court, however, allowed for (See Exhibit "I", at 933, my 11th Cir. Petition for Rehearing, dated March 7, 1984,

on file in the Office of the Clerk, U. S. Supreme Court):

- a. "that [Whittaker, a working test] plaintiff could challenge either employment practices...or policies affecting working test employees" [in the DHR].
- b. "that the [working test] plaintiff would have full opportunity to explore the allegedly discriminatory system-wide employment practices."

(See also pages 10-13, and EXs "B", "C", "D", and "J", my 11th Cir. Petition for Rehearing, dated March 7, 1984, on file in the Office of the Clerk, U. S. Supreme Court for DHR coreligionist discrimination provided by the Middle District of Georgia Court System).

The 14th Amendment is extended to "persons" by Bakke, and "persons" have property and liberty rights. Bakke corrected the Bishop, Roth paradox for minorities all minorities, probationary or otherwise classified:

"The guarantees of equal protection cannot mean one thing when applied to one individual and something else

when applied to a person of another color." (University of California Regents v. Bakke 438 U.S. 265 (1978)).

A minority employee does not relinquish his rights and the benefits of general law when crossing the employment threshold of State of Ga.

Firing a working test employee can only be for inadequate job performance and only at the end of the working test.

I was fired to eliminate any further opposition to a hiring of a white from outside as the Director of Management Information; respondents are correct in stating at page 18 that there was "dissatisfaction" with the personnel [hiring] decision. Probationaries may not be fired for such expressions per Tygrett and 704 (a), Title VII.

Chief Judge Godbold agrees:

"When he (Jones) informed his supervisor that this treatment violated the department's regulations, he received no relief. He continued to press his claim as well as other objections to his working conditions, and was fired in October

1981".

On page 21 of the Brief in Opposition it is stated that "When a public employee is not retained after completing a probationary period and his position is terminable at will...". The Court is reminded that Petitioner was fired before the completion of the probationary period and 18 days after I stated my claim (See para 30, page 36, Appendix D, Record of Appendices and Ex "G" and "H" 11th Cir. Record of Excerpts for Appellant's Reply, dated October 4, 1983 on file with the Clerk, U. S. Supreme Court) continued to "press my claim".

In Tygett v. Washington, D.C., Cir. No. 1392-72, October 23 (1974), a probationary policeman with the District of Columbia police department was fired after being reported as having made statements in favor of a "sick-in."

The 11th Cir. erred by not ruling in favor of petitioner per the Court of

Appeals note in Tygrett:

"[Probationary] Policemen, like teachers, and lawyers, [and also minority work test employees], are not relegated to a watered-down version of constitutional rights."

"He could not, however, be banished from the force "on a basis that infringes his constitutionally protected interests - especially his interest in freedom of speech." (e.g. Petitioner's 704 (a)).

Certainly an employee cannot be discharged for protected (e.g. 704 [a], Title VII) speech. Even if the speech were unprotected, he cannot be discharged unless it is for good cause shown.

If one looks at the Tygrett decision closely you can see that the speech there lacked any nexus to efficiency of the service since there was no showing that "the speech in question adversely affected his efficiency as a [probationary] police officer or the efficiency of the Department as a Police force."

Nexus concepts extend into constitutional rights areas such as free speech. They are indeed the overlay to all areas



of personnel law. Thus, the First Amendment and nexus cases also demonstrate the increased emphasis on constitutional rights.

One central issue in my petition is that the firing was in violation of Sections 703 and 704, Title VII and there are some 38 State Merit System Rules that provide PETITIONER courses of action for remedies within the State Merit System prior to a dismissal (See pages 20 and 51 of my PETITION FOR WRIT OF CERTIORARI). Respondents refused to follow the majority of their own rules which permitted filing of a grievance and appeals (See Appendix "F" Record of Appendices).

In Accardi v. Shaughnessy, 347 U. S. 260 (1954); Service v. Dulles, 354 U. S. 363, 372 (1957) "regulations validity prescribed by a government administrator are binding upon him as well as the citizen, and this principle holds even when the administrative action under review is

discretionary in nature."

Cleveland Board of Education v. Laflaur (414 U.S. 632, 1974) establishes that administrative convenience cannot validate arbitrary rules.

In Monroe v. Pope, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2 492 (1961). The Court identified three purposes:

1. The overriding of particular state laws; 2. The provision of a remedy when state law was inadequate; and 3. The creation of a federal remedy when the state remedy, though adequate in theory, was not available in practice.

On page 16 of respondents response they state the inadequacy of state law:

"as a matter of State law, a working test employee may be dismissed...at any time...and has no right to seek relief pursuant to the appeal"

If this is true then why (See page 75, MY RECORD OF APPENDICES, Rules 1, 3 to 6, 8, 10, 12 to 33) would so many rules state just the opposite?

And, to further demonstrate the inadequacy of Georgia State Law when compared to the Georgia at-will law stated

by respondents as justification for terminations, GA. LAW, 1975, Section 7. Adverse Actions, Appeals and Hearings is clear and does not differentiate between the applicability of the law to different classes of employees and it does not exclude minority probationary employees:

"NO (emphasis supplied) employee of any (emphasis supplied) department who is included under this Act or hereafter included under its authority and who is subject to the rules and regulations prescribed by the State Merit System MAY BE DISMISSED from said department or OTHERWISE ADVERSELY AFFECTED as to COMPENSATION OR EMPLOYMENT STATUS EXCEPT FOR GOOD CAUSE..."

And, SECTION 703(a), Title VII is very clear:

"It shall be an unlawful employment practice... (2) to limit, or classify his employees [working test] or applicants for employment in any way which would deprive or tend to deprive [any minority working test employee of rights, as desired and stated by respondents at page 16] any individual of employment opportunities or otherwise adversely affect his status as an employee..."

In Wieman v. Updegraff, 344 U.S. 183, 192 (1952), the Supreme Court noted:

"We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to statute is patently arbitrary or discriminatory."

And in Scott v. Macy, 349 F. 2d 182, 183-4 (D.C. Cir 1965) and Norlander v. Schleck 345 F. Supp. 595 (D Minn. 1972) it has been held that an applicant for public employment is not without constitutional protection. The Constitution does not distinguish between applicants and employees; both are entitled like other people, to equal protection against arbitrary and discriminatory treatment by the government.

To the original review for procedural regularity, the standard added by which courts examine the executive action to determine whether it was "arbitrary or capricious", McCarthy v. Philadelphia Civil Service Commission - U.S., March 22, 1976' (Shapiro v. Thompson, 394 U.S. 618 (1969); Cleveland Board of Education

v. LaFleur, 414, U.S. 632 (1974); Cohen v. Chesterfield County, 474 F 2d 395 (1973)' Sugarman v. Dougall, 413 U.S. 634 (1973)' See e.g., Truas v. Raich, 239 U.S. 33 (1915); Takahaski v. Fish - Game Commission, 334 U.S. 410 (1948); Sugarman v. Dougall, supra; Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973) 2nd Report, U.S. Civil Ser. Comm. 83 (1885).

Respondents are incorrect when stating at pages 7 and 20 their "discretionary" authorities, and that managerial discretion is "at-will", at pages 16, 20, 21.. A manager can be sued and required to stand trial to demonstrate that discretionary nature of his position and the good faith. Monge v. Beebe Rubber Co., New Hamp. Supreme Court 1974 and those below:

"A termination by the employer of a contract of employment at will which is motivated by bad faith or malice, or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract."

In the United States v. Park the Supreme Court said:

"... employees who execute the organizational mission have a positive duty to seek out and remedy violations of the laws when they occur and a further affirmative duty to ensure the violations do not occur."

In Wood v. Strickland, 420 U. S. 308, 95 S. Ct. 992, 1975 this Court set forth the formulation for judging actions and damages taken while discharging his official responsibilities:

"...if he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of the (individual) affected or if he took the action with malicious intention to cause a deprivation of constitutional rights or injury to the (individual)." 85 S. Ct. at 1001.

In De Grace v. Rumsfeld, 614 F.2d 796 (1980) The court found that management had not satisfied its obligation to correct the conduct, and that even if the base commander's motive was pure, this would not insulate defendants from their



failure to correct the racially offensive conduct;

"An employer may not stand by and allow an employee to be subjected to a course of racial harassment by co-workers, and thus defendants must accept responsibility for their supervisors' derelictions if such existed, in responding to the racial problem [at the base]."

In Williams v. Codd, 459 F. Supp. 804 (S.D.N.Y. 1978), 42 U.S.C.A. 1983, a plaintiff need only show as minimum:

a. deprivation of due process, that is, deprivation of the fundamentals of fair play;

b. discrimination, e.g., discrimination on the basis of race or religion; or

c. clearly unreasonable, arbitrary, or capricious action. See Estrban v. Central Mississippi State College, 415 F. 2d 1077 (1979); and, it is not necessary to find that the defendants had any specific intent to deprive the Plaintiff of his civil rights (see Pierson v. Ray, 386 U.S. 547 (1967); Roberts v. Williams, 456 F. 2d (5th Cir. 1971); Whirl v. Kern, 407 F 2d 781 (5th Cir. 1968); Skehan v. Board of Trustees, 538 F.2d 53 (3rd Cir. 1976 (en banc)) Navarette v. Enomoto, 536 F. 2d 277 (9th Cir. 1976).

Under the Vitarelli doctrine, of Vitarelli v. Seaton, 359 U.S. 535 (1959), the employee must be given the greatest procedural protection to which he is



entitled under any possible regulatory standards. See Cole v. Young, 351 U.S. 536 (1955). Accord: Slowich v. Hampton, 470 F 2d 467 (D.C. Cir. 1972); O'Shea v. Blatchford, 346 F. Supp. 742 (S.D.N.Y. 1972); Massman v. Secretary of Housing and Urban Development, 332 F. Supp. 894 (DDC 1971).

A decision to fire must be based on an official finding of inadequate performance when there is an expectation of continued employment, and where there was an expectation of continued employment, as a minimum, to the end of the "probationary period of six months: That if Plaintiffs who have had a property interest because of an "expectation of continued employment and absent an official finding of inadequate performance" are due rights, thus, a "probationary" employee is ENTITLED THE SAME OFFICIAL FINDING STANDARD including an "expectation in continued employment" absent an

official finding of inadequate performance.

On page 22 respondents assert that "the ultimate control of State personnel relations is, and should remain, with the State"; however, respondents did not consider:

"A proper balance between freedom of expression and discipline in government service should not unreasonably restrain expressions of opinion and should permit and encourage full inquiry into allegations of racial and religious discrimination." Murphy v. Facendra, 307 F. Supp. 353 D. Colo. 1969. See also Ianarelli v. Morton, 327 F. Supp. 873 (E.D. Pa. 1971) affd. 463 F 2d 179 (3rd Cir. 1972):

#### CONCLUSION

Rejecting a claim regarding discriminatory actions on basis of respondents vaguely asserted and ill-defined abstract notions will represent clear error of law and fact. Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983).

Respondent reasoning at page 24 that "...even if ill-advised, [personnel decisions are] best corrected by means other than a resort to a federal forum" is

defective. If the State of Georgia is permitted to prevail with an abstract notion of Bishop, Roth, and Pickering it will create havoc by causing a tremendous opening (loophole) in discrimination law, and minorities in the employment of the State of Georgia will be made to suffer.

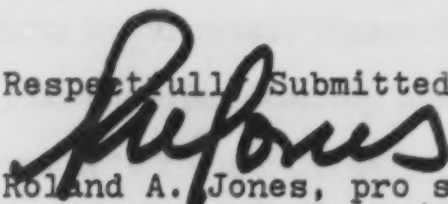
While respondents rules and regulations allow for filing of a grievance within the DHR and State of Georgia Merit System, the system of white supervisors foreclosed on these rights with a rushed termination.

In view of all of the rules and regulations available to Petitioner for appeals and grievances, respondents, by their actions in this case, have already proven that access to their own internal forum is an exercise in futility, capriciously made impossible by the design of the white DHR supervisors (See pages 75-86, Appen. "F", Record of Appendices and Exs "E", "F", "D", and "G", my 11th Cir.

Petition for Rehearing, dated March 7, 1984, on file with the Clerk, U. S. Supreme Court). Respondents provided no reasonable justification or evidence for the termination.

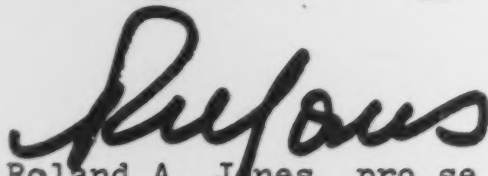
In view of the preponderance of discrimination law, the foregoing points/authorities, the number of "protected group working test members" affected, the conclusion is inescapable that I present a case in which conflicting decisions in important questions of discrimination law must be resolved, and the judgment against me overruled. Each defendant should be required to suffer as I have been made to suffer; therefore, compensation and very heavy punitive damages, and expenses must be assessed against each defendant, individually and in their capacities.

Respectfully Submitted,

  
Roland A. Jones, pro se  
Lt. Col. U. S. Army (Retired)

CERTIFICATE OF SERVICE

I certify that I have served 3 copies  
of the foregoing to counsel of record by  
hand on this 18th day of October 1984.

A large, stylized handwritten signature in black ink, appearing to read "Rufous" or "Rufous".

Roland A. Jones, pro se  
Lt. Col. U. S. Army (Retired)